NO. 91-1839

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD BERNARD BAKER
Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, CASE NO. 91-K-2201 APPLICATION FOR GERALD BERNARD BAKER

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner may validly object to a jury charge which, under a ruling of the United States Supreme Court handed down while the present case was on direct appeal, is violative of the Due Process Clause of the Fourteenth Amendment, despite a State Court determination that the Petitioner failed to comply with the Contemporaneous Objection Rule?

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REPORTS OF OPINIONS

The Defendant was found guilty of First Degree Murder in Criminal District Court in Orleans Parish, Louisiana, Case No. 330-597, and on November 30, 1989, the trial court sentenced him to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558 affirmed the verdict on May 30, 1991. An Application for Rehearing filed in the Louisiana Court of Appeal for the Fourth Circuit was denied on August 27, 1991, without written reasons. The Louisiana Supreme Court, No. 91-K-2201 denied the Defendant's Application for a Writ of Certiorari and/or Review to the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, on January 10, 1992. On April 3, 1992, United States Supreme Court Justice Antonin Scalia signed an Order extending the time for filing a Petition for Writ of Certiorari in the present case to and including May 11, 1992.

STATEMENT OF GROUNDS FOR JURISDICTION

The Petitioner seeks review of the opinion of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, rendered on May 30, 1991, rehearing denied, August 27, 1991, without written reasons. The Louisiana Supreme Court, No. 91-K-2201, denied the Defendant's Application for a Writ of Certiorari and/or Review to the Louisiana Court of Appeal for the Fourth Circuit No. 90-KA-0558, on January 10, 1992. On April 3, 1992, United States Supreme Court Justice Antonin Scalia signed an Order extending the time for filing a Petition for a Writ of Certiorari in the present case to and including May 11, 1992. (Appendix D, Order Extending Time; Appendix G, Application for Extension of Time).

This Honorable Court has jurisdiction to review the opinion of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, by Writ of Certiorari under Supreme Court Rule 10.1(c) because the State Court of Appeals decided a question of federal law in a way that conflicts with a decision of this Honorable Court. The Louisiana Court of Appeal affirmed the verdict and sentence in this case, refusing to review the jury charge as to "reasonable doubt" given in this case on the basis of the Contemporaneous Objection Rule even though the same jury charge was held by the United States Supreme Court in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990), to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because a reasonable juror could interpret the instruction as allowing a finding of guilt based upon a lower degree of proof than that required by the Due Process Clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend. XIV:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supeme Court Rule 10.1(c):

> When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

STATEMENT OF THE CASE

On August 25, 1989, during the First Degree Murder trial of the Petitioner, the Trial Judge gave the following instruction to the jury:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the guilt of the defendant, it is your sworn duty to give him the benefit of that doubt and return the verdict of not guilty. This doubt must be a reasonable one, however. That is, one founded upon a real, tangible and substantial basis and not upon a mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty raised in your mind by reason of the unsatisfactory character of the evidence. Likewise, if the State has proved the guilt of the defendant to your satisfaction, and beyond a reasonable doubt, you should return a verdict of guilty. (Appendix H, Transcript of Court's charge to the jury, p. A-103).

Counsel for the Petitioner made an objection based on the confusing language of a portion of the general charge. (Appendix H, Transcript of Court's charge to the jury, p. A-120). At the time of trial, the jury charge as to reasonable doubt was in accordance with established Louisiana jurisprudence, and therefore, the counsel for the Petitioner did not specifically object to the language of the reasonable doubt charge. However, while this case was pending on appeal, the United States Supreme Court held that a jury charge as to the reasonable doubt standard containing the same language as the jury charge at issue in this case violated the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990).

The United States Supreme Court ruled in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990) in November of 1990, while the present case was still pending on direct review by the Louisiana Court of Appeal for the Fourth Circuit, but after all briefs had been filed. Accordingly, undersigned counsel raised the issue of the unconstitutional jury instruction at oral argument before the Court of Appeal for the Fourth Circuit, which, in its opinion of May 30, 1991, dismissed the issue out of hand on the basis of the Contemporaneous Objection Rule. (Appendix A, Opinion of Fourth Circuit Court of Appeal, p. A-36). Undersigned counsel also raised the issue of the unconstitutional jury instruction in his Application for Rehearing, which was denied. (Appendix E, Application for Rehearing in the Louisiana Fourth Circuit Court of Appeal, pp. A-45 - A-48; Appendix B, Notice of Denial of Rehearing in the Louisiana Court of Appeal for the Fourth Circuit). Finally, the issue of the unconstitutional jury instruction was also raised in an Application for Writ for Certiorari or Review to the Louisiana Supreme Court. (Appendix F, Application for Writ of Certiorari or Review to Review a Judgment of Court of Appeal Fourth Circuit, State of Louisiana, pp. A-75 - A-84). The Application for a Writ of Certiorari was denied on January 10, 1992 without written reasons. (Appendix C, Louisiana Supreme Court denial of Writ of Certiorari and/or Review).

ARGUMENT

At the First Degree Murder trial of the Petitioner in August of 1989, the Trial Judge gave the jury an instruction as to the reasonable doubt standard which this Honorable Court has determined is violative of the Due Process Clause of the Fourteenth Amendment. *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990). In November of 1990, while the present case was still pending on direct review in the Louisiana Court of Appeal, the

United States Supreme Court reversed the Petitioner's First Degree Murder conviction and sentence in *Cage* because the jury charge as to reasonable doubt would allow a reasonable juror to "have interpreted the instruction to allow a finding of guilt based upon a degree of proof below that required by the Due Process Clause." *Cage v. Louisiana*, 111 S. Ct. at 330. This Court reasoned that the jury charge in *Cage* required a higher degree of doubt than the reasonable doubt standard, because the charge equated "reasonable doubt" with a "grave uncertainty" and an "actual substantial doubt," and required a "moral certainty." *Id.* at 329.

The jury charge in the present case contained the very language held by this court in *Cage* to be violative of fundamental due process. The trial judge instructed the jury that the doubt must be "one founded upon a real, tangible, and *substantial* basis...as would give rise to a *grave uncertainty* raised in your mind by reason of the unsatisfactory character of the evidence." (Emphasis added) (Appendix H, Transcript of Court's Charge to the Jury, p. A-103). As this Court pointed out in *Cage*, "[i]t is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.* at 329 - 30. Therefore, under *Cage*, it is indisputable that the jury charge given in the present case violates the Petitioner's fundamental due process rights.

Furthermore, the rule of *Cage* clearly would apply to the present case. In *Griffith v. Kentucky*, 479 U.S. 314, 328 (1986), this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." See *Skelton v.*

Whitley, 950 F. 2d 1037, 1038 (5th Cir. 1992) (In dictum, the United States Court of Appeals for the Fifth Circuit stated: "If [the petitioner's] conviction were on direct appeal, the Supreme Court's decision in *Cage v. Louisiana,* ____ U.S. ____, 111 S. Ct. 328, 330, 112 L. Ed. 2d 339 (1990), ... would be directly controlling.") Therefore, *Cage,* as a new rule for the conduct of criminal prosecutions, is applicable to this case, which was pending on direct appeal from the Louisiana trial court at the time the *Cage* decision was rendered.

The only remaining issue is whether a State law procedural bar may be used to deny the Petitioner the right to complain of a jury charge determined by this Court to be a violation of fundamental due process. The reasoning of this Court in *Reed v. Ross,* 468 U.S. 1 (1983) is instructive in the present case. Similarly to the *Cage* opinion, the Court in *Reed* considered the issue of a jury instruction as to the burden of proof in a criminal case in light of the ruling of *In Re: Winship,* 397 U.S. 358 (1970) that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Reed,* 468 U.S. at 3 (citing *In Re: Winship,* 397 U.S. at 364). The defendant in *Reed* was convicted of First Degree Murder and sentenced to life imprisonment. In post-conviction proceedings, he challenged the jury instruction as to lack of malice given at his trial, arguing *Mullaney v. Wilbur,* 421 U.S. 684 (1975) struck down the requirement that the defendant bear the burden of proving lack of malice as violative of due process. *Reed, Id.* at 4. The North Carolina State Courts, however, held that the defendant was barred from raising the *Mullaney* issue in post-conviction proceedings because he did not contest the jury instruction on appeal as required under North Carolina law. The United States District Court subsequently held that Federal

habeas relief was also barred because of the defendant's failure to raise the issue on appeal.

The United States Supreme Court, however, held that the State law procedural bar should not be applied where the defendant could show there was cause for the defendant's failure to raise the issue timely, and resulting prejudice. (The "cause and prejudice" standard). *Reed, Id.* at 11. A defendant has cause for failure to raise his claim under applicable State procedures "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Id.* at 16. This Court reasoned that:

> If we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt State Court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition. *Id.* at 15-16.

The failure to object at trial to the jury charge in the present case was clearly "for cause" because of the novelty of the constitutional question at issue. At the time of trial in August, 1989, the jury charge in question had been upheld several times by the Louisiana Supreme Court, and in fact was again upheld in December of 1989, after the trial in this case, by the Louisiana Supreme Court. *State v. Cage,* 554 So. 2d 39 (La. 1989), rev'd, 111 S. Ct. 328 (1990). See *State v. Messiah,* 538 So. 2d 175 (La. 1988); *State v. Taylor,* 410 So. 2d 224 (La. 1982). Therefore, at the time of trial, the counsel for the Petitioner was aware that the charge in question, which was the standard jury charge as to reasonable doubt given in Criminal District Court for the Parish of Orleans, had been settled under established Louisiana jurisprudence. The counsel for Petitioner clearly

had cause for failure to contemporaneously object because the constitutional claim later arising under the *Cage* decision was "so novel" at the time of trial "that its legal basis [was] not reasonably available to counsel." *Reed, Id.* at 16.

The failure to object in the present case is clearly not an example of a tactical decision made by counsel. *Id.* at 14. Instead, as in *Reed*, the failure to object was "not attributable to an intentional decision by counsel made in pursuit of his client's interest." *Id.* at 14. The cause requirement is met when counsel has failed to raise a "constitutional issue reasonably unknown to him." *Id.*

Federal Courts have consistently exercised their power under habeas review to "look beyond a State procedural forfeiture and entertain a State prisoner's contention that his constitutional rights have been violated." *Id.* at 9. (quoting *Francis v. Henderson*, 425 U.S. 536, 538 (1986); *Fay v. Noia*, 372 U.S. 391, 398-399 (1963)). In determining whether to review a State prisoner's constitutional claim, the Federal Courts will weigh two competing concerns. The first concern is "Congress' expressed interest in providing a federal forum for the vindication of the constitutional rights of State prisoners." *Id.* at 10. This interest would be further served by granting review in the present case, which involves a clear violation of fundamental due process rights as determined by this Court in *Cage v. Louisiana*.

The competing concern is the "State's interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the Federal Courts were too free to ignore procedural forfeitures in State Court." *Id.* at 10. According to the majority opinion in *Reed*, this concern would not be implicated in the present case. Under *Reed*, a "counsel's failure to raise a claim for which there was no reasonable basis in ex-

isting law does not seriously implicate any of the concerns that might otherwise require deference to a State's procedural bar." *Id.* at 15. Therefore, the Federal Court's empowerment to look beyond a State procedural forfeiture and consider a State prisoner's claim of a violation of his constitutional rights should be exercised in the present case. Such review is not only consistent with the competing concerns traditionally weighed by the Courts, but is also necessary to vindicate the Petitioner's fundamental due process rights. Prejudice clearly exists in that the jury charge in question has been determined by the United States Supreme Court to violate the Due Process Clause of the Fourteenth Amendment, and was the basis in *Cage* for reversing the First Degree Murder conviction. As the Court in *Cage* pointed out, the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure.' " *Cage, Id.* at 329 (quoting *In Re: Winship,* 397 U.S. at 363). As this Court held in both *Reed* and *Cage*, the constitutional foundation of the requirement that guilt must be established beyond a reasonable doubt is the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Reed, Id.* at 3; *Cage, Id.* at 329 (quoting *In Re: Winship, Id.* at 364).

The Petitioner in this case is a man over sixty years of age who has been sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. Unless he obtains a judicial remedy in appellate or post-conviction proceedings, he wil spend the rest of his natural life in prison. Therefore, when a substantial right under the Due Process Clause is at issue, the Petitioner should be entitled to the same judicial relief as a defendant who received a sentence of death rather than life imprisonment. Under Louisiana law, when a death sentence is im-

posed, a reviewing court will consider all errors, even if no contemporaneous objection was made, in order to determine whether the verdict was unreliable. *State v. Burrell*, 561 So. 2d 692, 699 (La. 1990), cert. den. 112 L. Ed. 2d 86. The Petitioner in this case is entitled at the least to the same standard for review of errors as a defendant who receives a death sentence, particularly in light of the important constitutional right in question.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been hand-delivered to the Assistant District Attorney for Section "H" of Criminal District Court for the Parish of Orleans, 2700 Tulane Avenue, New Orleans, Louisiana 70119, Phone: 827-3565, Counsel for the State of Louisiana, this 11th day of MAY, 1992 in compliance with Supreme Court Rule 29.3.

All parties required to be served have been served.

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VERSUS

STATE OF LOUISIANA
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, CASE NO. 91-K-2201 APPLICATION FOR GERALD BERNARD BAKER

APPENDIX
VOLUME I

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APPENDIX A

STATE OF LOUISIANA — NO. 90-KA-0558

VERSUS — COURT OF APPEAL

GERALD BAKER — FOURTH CIRCUIT

STATE OF LOUISIANA

* * *

ON APPEAL FROM CRIMINAL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 330-597, SECTION "H"
HONORABLE JAMES MCKAY, JUDGE

* * *

ROBERT L. LOBRANO
JUDGE

(Court composed of Judges Robert J. Klees,
Robert L. Lobrano and Charles R. Ward)

MAY 30 1991

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AFFIRMED.

Defendant, Gerald Bernard "Ben" Baker, Sr., was indicted by a grand jury for the November 2, 1988 first degree murder of Michael Alden, Jr., a violation of La. R.S. 14:30.

Defendant was arraigned on December 12, 1988 and pled not guilty. Trial was held August 22nd thru 25th, 1989. Defendant was found guilty as charged by a twelve member jury. Following the sentencing phase of the trial, the jury recommended that defendant be sentenced to life imprisonment.

On November 30, 1989, the trial court denied defendant's motion for a new trial. Defendant waived all delays and was sentenced to life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

FACTS:

On November 2, 1988, at approximately 9:15 a.m. defendant arrived at the home of Rhoda and Michael Alden, Sr. located at 7711 Redfish Street in New Orleans, Louisiana. The purpose of his visit was to look through some old books that Mrs. Alden was going to give to the public library and to bring her a weight loss tape. Defend-

ant, who was knowledgeable in hypnosis, had been helping Mrs. Alden attempt to lose weight through hypnotic suggestion. Mrs. Alden and her husband had known defendant for fourteen years mostly through business dealings.

At trial, Mrs. Alden testified that defendant had made the appointment for 10:00 a.m. When defendant arrived early she was not ready to receive him and asked him to wait outside. After making herself more presentable, Mrs. Alden turned off the burglar alarm system and let defendant in the house. Defendant was wearing a floppy navy blue hat, light blue shirt, navy blue pants, blue sweater, navy blue trench coat and was carrying a brief case. Also present in the home was the victim, Michael Alden, Jr. who was in his bedroom. Mrs. Alden stated her son worked at night as a security guard at the Windsor Court Hotel and often slept late. She testified that she knew he was in his room that morning with the family's two dogs and couldn't say whether he was sleeping, listening to music or watching television as he often used headphones.

Mrs. Alden stated that once she let defendant inside, she re-set the alarm system. She testified that the house was equipped with a sophisticated alarm system to protect the valuable art which her husband sold through his art business. She stated she routinely kept the system armed and used by-pass switches to go in and out.

Mrs. Alden stated that once inside the house, the defendant began to act very strange. She stated he took off his coat and neatly folded it. Then he took off his hat and placed it on the table. He then requested a cup of "International Coffee", a brand which he always professed not to like. Then he took off his sweater and threw it. She stated this was very uncharacteristic of him because he

was a very neat person. In addition, she testified that he requested that she not answer the phone but rather turn on the answering machine. She stated she refused not to answer the phone because of her husband's business.

Defendant and Mrs. Alden then proceeded to drink coffee and engage in general conversation during which defendant stated that he was considering buying a gift for his wife and asked to see several pieces of jewelry Mrs. Alden had for sale. Mrs. Alden operated a jewelry business from her home and kept the jewelry in a safe in an office in the rear of the house. At defendant's request, Mrs. Alden removed the jewelry from the safe and showed it to defendant. After viewing the jewelry for several minutes, defendant decided not to buy it. Mrs. Alden then placed the jewelry back in the safe. General conversation then resumed. After a short period of time, defendant asked to see one of the pieces again, a gold and diamond necklace. Again, Mrs. Alden removed the necklace and showed it to defendant. Again defendant decided not to buy it and Mrs. Alden placed it back in the safe. Defendant asked to see the necklace several more times only to change his mind about purchasing it. Mrs. Alden testified that defendant's indecision was becoming an annoyance. She requested that he take the necklace on loan and show it to his wife. If he decided to keep it he could pay her later. Defendant declined the offer.

All the while that defendant kept asking to see the jewelry, Mrs. Alden kept directing his attention to the boxes of books. She requested several times that he look through the boxes and pick which books he wanted. She even suggested that if he needed help carrying the books that she would call her son Michael to help him. Defendant declined the offer. Instead, he asked again to see the gold and diamond necklace. As Mrs. Alden was removing the

necklace from the safe, she was struck on the head. Believing that something had fallen from above the safe, she cried out to defendant to help her. As she turned around, she saw defendant standing behind her. He had a "horrible grimace on his face". He then shot her three times. Realizing what had happened, Mrs. Alden lay still on the floor pretending to be dead. She then heard a struggle accompanied by a succession of screams and a gurgling sound. Eventually she was able to get up, turn off the alarm using a by-pass switch and exit through a side door. She ran across the car port to the home of her next door neighbor, Andy Williams at 7713 Redfish Street. Mr. Williams lived there with his parents. Mrs. Alden told Williams and his mother that defendant shot her and that Michael was still in the house.

Williams then placed a call to 911. He told the dispatcher that Mrs. Alden had been shot. He then went over to the Alden home and looked inside but was unable to see anyone. Shortly thereafter, the police arrived. they spoke to Mrs. Alden and then drove her to the hospital. Because of the possibility that Michael Alden was being held hostage, several police officers took up positions around the house.

Officer Tommy Silbernagel was watching the rear of the residence. He observed a white, heavy set male wearing dark pants and a light blue shirt walk past the sliding glass door in the direction of the laundry room. Several minutes later he saw a differently dressed heavy set white male wearing dark pants, a dark jacket or sweater and a dark hat walk past the sliding glass door in the opposite direction. Silbernagel observed this activity several more times. At no time did Silbernagel observe two individuals walk past the door together. Silbernagel testified that at first he thought he was seeing two people but after watchin for a while, he realized he was seeing the same person attemp-

ting to disguise himself to look like two people.

After approximately thirty minutes of surveillance, defendant exited the front door of the Alden house. He was wearing a light blue shirt with blood stains and dark navy blue pants. Defendant was frisked for weapons and placed in a police car. Sergeant Wilbain Porter and Officer Silbernagel entered the house. They found the body of Michael Alden, Jr. on the floor of the den. He had sustained two gunshot woulds and several stab wounds. A wire coathanger was wrapped around his throat and mouth. It was learned later that before he died, the victim had placed a 911 call for help. He did not identify his killer.

The police searched the house. Two kitchen knives were seized as the possible murder weapons. The following day, Detective Jackleen Davis found a .22 caliber revolver, belonging to defendant, shoved between boxes on a bookshelf in the victim's bedroom.

Defendant's car, which was parked outside the house, was searched. Inside the trunk was found defendant's Louisiana license plate and numerous U.S. postal mailbags. An Ohio license plate was on the car. A warning sticker was placed over the brake tag and a piece of black electrical tape covered the dealership nameplate.

Defendant was transported to the homicide office where he was given his Miranda rights. Defendant refused to give a statement to police. However, as Detective Davis began to complete the field arrest report, defendant began to speak. He stated that when he answered the door, two black men rushed past him. An altercation ensued during which he was knocked unconscious. He later awoke to find the victim lying wounded on the den floor.

Defendant's clothes were tested for the presence of gunpowder. None was found. No gunpowder tests were done on defendant's hands.

The autopsy revealed the victim sustained two gunshot wounds and five stab wounds. Dr. Thomas Gilchrist, who performed the autopsy, testified the victim died from the gunshot wounds with the stab wounds a contributing factor. The coathanger did not contribute to the victim's death.

Ballistics tests showed the bullets recovered from the victim were fired from defendant's gun which was found at the scene. Two human hairs were found in the victim's hand. These were tested by the F.B.I. crime lab. Neither hair was from defendant. One was light caucasian hair and one was a negroid limb hair fragment.

The defense presented several expert witnesses.

Dr. George McCormick, a pathologist, testified that the blood stains on defendant's shirt were not consistent with the victim's stab wounds.

Dr. Al Yonovitz, an expert in speech and hearing analysis, analyzed the 911 calls made by Williams and the victim and the police broadcast tape. Dr. Yonovitz testified that an enhanced analysis of the victim's 911 call revealed the presence of a male voice in the background that was neither the victim's nor the dispatcher's. In addition he concluded that there was another male voice in the background which said, "Just kill him and let's get out of here." The victim'-s 911 call and the police broadcast tape were played for the jury.

James Parrie and his mother, Maria Parrie testified

for defendant. Both stated they knew the Aldens and defendant for many years. They stated that they went to see Mrs. Alden at Methodist Hospital. They testified that she stated that she could not believe defendant shot her but that he must have done it because the police said he did. They further testified that Mrs. alden described her assailant as having a distorted face and long flowing hair.

Javier Banos, defendant's financial advisor, testified that at the time of the murder, defendant had approximately $200,000.00 in mutual funds and was in good financial shape.

Dr. Charles Moan, a psychologist, conducted a psychological evaluation of defendant. He testified that in his opinion there was a very low probability that defendant committed the murder because of his personality which he described as a "fussy old man".

Defendant testified in his own behalf. He stated he arrived at the Alden's home at 9:15 a.m. to give Mrs. Alden a new hypnosis tape and to look through some old books. He stated that he and Mrs. Alden talked about various subjects during which she tried to get him to buy a gold necklace for his wife. He stated he told her that he was not interested in buying it. He stated that throughout their conversation, Mrs. Alden received several telephone calls. During the one call, he let the Alden's two dogs into the house through a back door. He testified the alarm did not sound when he let the dogs in. He stated that around noon, Mrs. Alden received another telephone call. She went into the back office to answer the call. Defendant testified he remained seated in a chair in the den petting the dogs. He then stated he sensed the presence of someone in the room whom he believed to be Mrs. Alden. When he looked up, he saw a dark complexioned man. He was then struck on the

head and knocked to the floor. He testified that he reached for his gun which he carried in his brief case. The assailant took the gun from him and knocked him unconscious. When he regained consciousness, he got up and began to go down the hall at which time he confronted the assailant who was dragging Michael Alden by the hair. When the assailant saw defendant, he let Michael go then kicked defendant in the groin causing him once again to loose consciousness. When he regained consciousness, he found the victim lying on the floor in the den. Defendant testified he attempted to lift the victim in an effort to help him but he was too heavy. He stated that he then exited the house where he was grabbed by the police and placed in a police car.

Defendant stated he put the Ohio license plate on his car so he could play a practical joke on Mrs. Alden who always said Yankees were better horse traders than southerners. He was going to take her outside and show her that he had become a "Yankee trader". He testified he found the Ohio plate in the parking lot of Home Depot. Defendant testified the sticker he placed over his brake tag was placed there to discourage car thieves. He stated that these stickers were used in a business he once owned in which he video taped home and business inventory to protect against theft. He stated the electrical tape over the dealership nameplate must have been left there by the body shop that worked on the car a few weeks before. He testified that the mailbags were used in a mail order picture frame business he partially owned.

Defendant appeals his conviction and sentence asserting the following assignments of error:

> 1) The trial court erred in denying the subpoena duces tecum for Rhoda Alden's psychological records.

2) The trial court erred in denying the motion to suppress defendant's statements.

3) The trial court erred in denying a request for the complete investigatory report.

4) The trial court erred in denying the release of exculpatory evidence contained in the full police report.

5) The trial court erred in admitting the hearsay testimony of Andy Williams.

6) The trial court erred in allowing the jury to view the affidavit for the search warrant.

7) The trial court erred in playing the entire tape of a police call.

8) The State failed to present sufficient evidence to sustain defendant's conviction.

9) The trial court erred in denying the Motion for a New Trial.

10) The trial court erred in not allowing the defense to call a juror to testify in the Motion for a New Trial.

11) The defendant is deprived of his constitutional right to appeal due to an incomplete transcript.

12) The trial court erred in allowing the State to present hearsay testimony of Mrs. Alden's prior consistent testimony without laying a proper foundation and in allowing the jury to hear this hearsay testimony without a limiting instruction.

During oral argument, defendant raised the issue of an improper "Cage" jury charge[1] having been given.

ASSIGNMENT OF ERROR 1:

Defendant asserts the trial court erred in refusing to grant a subpoena duces tecum for the names of any and all psychiatrists and psychologists who had treated Mrs. Alden and all records pertaining to that treatment. Defendant argues the trial court should have allowed him to obtain this information in order to impeach Mrs. Alden's credibility as his investigation revealed a tendency on her part to lie and fabricate stories. In support of this contention, defendant cites Louisiana Code of Evidence Article 607 which allows any party to attack the credibility of a witness.

Following a hearing on the subpena duces tecum, the trial court ruled that Mrs. Alden's psychiatric records were privileged and not discoverable. We agree.

La. R.S. 15:476(A) provides in pertinent part:

> "A. Except as provided in Subsection B, no physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physical or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by reason of his being such physician. The provisions of this Section shall not apply to any physician, who,

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[1] *Cage v. Louisiana*, ___ U.S. ___, 111 S.Ct. 328 (1990).

> under the appointment of the court, and not by a selection of the patient, has made investigation into the patient's physical or mental condition; in addition, any physician may be cross-examined upon the correctness of any certificate issued by him."

La. R.S. 37:2363(A) provides in pertinent part:

> "A. In judicial proceedings, whether civil, criminal, or juvenile, legislative and administrative proceedings, and proceedings preliminary and ancillary thereto, a patient or client, or his legal representative, may refuse to disclose or prevent the disclosure of confidential information, including information contained in administrative records, communicated to a psychologist licensed under this Chapter, or persons reasonably believed by the patient or client to be licensed, or to their employees or other persons under their supervision, for the purpose of diagnosis, evaluation, or treatment of any mental or emotional condition or disorder."[2]

Defendant is correct in his assertion that Louisiana Code of Evidence Article 607 allows a witnesses' credibility to be attacked. However, Article 607 is a *broad* and *general* authority and does not regulate with specificity the nature of the evidence admissible to carry out such an attack. Other articles of the Code of Evidence detail what evidence is admissible to attack or support a witnesses' propensity or lack thereof for truthfullness.[3]

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[2]La. R.S. 37:2363 contains several exceptions to this privilege, none which are pertinent to the instant case.

[3] See, La. C.E. Articles 608, 609, 609.1 and 610.

Article 608 specifically provides:

"**A. Reputation evidence of character.** The credibility of a witness may be attacked or supported by evidence in the form of *general reputation only,* but subject to these limitations:

(1) The evidence may refer only to character for truthfulness or untruthfulness.

(2) A foundation must first be established that the character witness is familiar with the reputation of the witness whose credibility is in issue. The character witness shall not express his personal opinion as to the character of the witness whose credibility is in issue.

(3) Inquiry into specific acts on direct examination while qualifying the character witness or otherwise is prohibited.

B. Particular acts, vices, or courses of conduct. *Particular acts, vices, or courses of conduct of a witness may not be inquired into or proved by extrinsic evidence for the purpose of attacking his character for truthfulness, other than conviction of crime as provided in Articles 609 and 609.1 or as constitutionally required.*" (emphasis added)

Official comment (a) to Article 608 states:

"(a) This Article is generally based on Federal Rule of Evidence 608(a) and effects a change in Louisiana law. Under Paragraph A of this Article *reputation evidence concerning a witness' truthfulness or untruthfulness is the only form of character evidence admissible on the issue of credibility.* Testimony as to bad or good general moral character, which formerly was admissible

> under R.S. 15:490, is no longer admissible to attack or to support the credibility of a witness." (emphasis added).

Thus, the trial court did not err in refusing to issue the subpoena duces tecum for Mrs. Alden's psychiatric and/or psychological records. those records were privileged and not discoverable pursuant to La. R.S. 15:476 and La. R.S. 37:2363 and inadmissible pursuant to La. C.E. Article 608 because they did not constitute evidence of her general reputation for truthfulness. See also, *State v. Burrell,* 561 So.2d 692 (La. 1990), *cert. den.* 111 S.Ct. 799 (1991); *State v. Davis,* 562 So.2d 1173 (La. App. 4th Cir. 1990); *State v. Eishtadt,* 531 So.2d 1133 (La. App. 4th Cir. 1988).

ASSIGNMENT OF ERROR 2:

Defendant asserts the trial court erred in refusing to suppress statements made by him to Detective Jackleen Davis after defendant invoked his Fifth amendment right to silence and to have his attorney present. Defendant argues there was no voluntary waiver of his constitutional rights prior to the statements. He asserts he was prejudiced when the state used these statements to impeach his trial testimony as to the events that led to the murder of Michael Alden, Jr.

At the Motion to Suppress hearing, Detective Davis testified that she advised defendant of his Miranda rights at the homicide office prior to preparing the field arrest report. She stated that defendant indicated that he did not wish to make a statement. No interrogation followed. Detective Davis then asked defendant his full name, address and date of birth in order to complete the field arrest report. Defendant provided the information. As Detective Davis began to complete the report, defendanat began to talk or, as Detective Davis described it, "babble". Defend-

ant was very upset. He stated that he did not understand why he was being charged with murder. He told Detective Davis that when Mrs. Alden was in the rear office, he answered a knock at the front door. Two black men rushed in. An altercation ensued and he was knocked unconscious. When he awoke, he stated he found the victim in the den with various wounds. Detective Davis stated that she then asked defendant a question as to the statements and defendant stated he did not wish to continue talking and that he wanted his attorney. Detective Davis then completed the field arrest report. On cross examination, Detective Davis stated she did not re-advise defendant of his constitutional rights once he began to speak, did not interrupt him while he talked and did not write down or otherwise record his statements.

The statements made by defendant to Detective Davis were clearly exculpatory in nature. Here, the prosecution used these statements, not as a confession, but to impeach defendant's trial testimony as to what happened the day of the murder. This same issue was addressed in *State v. Malveaux,* 499 So.2d 301 (La. App. 1st Cir. 1986), *writ den.,* 505 So.2d 1138 (La. 1987). In *Malveaux,* as in the instant case, the State used exculpatory statements made by the defendant in conjunction with contradictory evidence in order to prove defendant's guilt. The defendant argued the statements were inadmissible. In afirming the trial court's ruling allowing the statements in evidence, the appellate court stated:

> "In *State v. Andrus,* 250 La. 765, 199 So.2d 867 (1967), the court noted that incriminating statements made by the accused are placed in three categories. The first is the confession which admits to the guilt of the crime charged. The second is the admission which involves the existence

of criminal intent. The third is the admission or acknowledgment of facts which tend to establish guilt but which do not involve the existence of criminal intent. *Id.* at 765, 199 So.2d at 880. The court concluded that remarks which are not express admissions of guilt or facts showing criminal intent can be introduced without the foundation necessary for admitting a confession, despite the fact that the statement might be considered inculpatory. *Id.* at 765, 199 So.2d at 881.

Of course, truly exculpatory statements are never used by the prosecution. Statements which the defendant intended to be exculpatory are instead used to impeach his testimony at trial or to demonstrate inaccuracies in the statement he gave under interrogation and thus to prove guilt by implication. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In *Miranda*, the Court demanded that the advice-of-rights warning be given regardless of whether the statements are considered inculpatory or exculpatory.

In the instant case, defendant's statements are exculpatory and do not purport to be confessions under LSA-R.S. 15:451. They do not involve the existence of criminal intent. The state offered these statements in conjunction with other contadictory statements and evidence for the obvious purpose of showing guilt by implication. Therefore, *the state was required only ot show that defendant had been advised of his constitutional rights and waived the same before making his statements.*" *Id.*, 499 So.2d at pps. 304 and 305. (emphasis added)

Once a defendant invokes his constitutional right to silence, the validity of any subsequent waiver depends upon the "scrupulous honoring" of the right by the police. *Michigan v. Mosley,* 423 U.S. 96, 96 S.Ct. 321 (1975); *State v. Brooks,* 505 So.2d 714 (La. 1987), *cert. den.,* 484 U.S. 947, 108 S.Ct. 337 (1987). Whether defendant's right to silence has been "scrupulously honored" depends upon the totality of the circumstances, including who initiated the further questioning; the time delay between the original request and subsequent questioning; whether *Miranda* warnings were given before each interrogation; whether a waiver of rights form was signed; and whether the police exerted pressure on the defendant between the time he invoked his right to silence and the subsequent interrogation. *State v. Brooks,* supra.

The statements made by defendant to Detective Davis were clearly exculpatory, spontaneous, voluntary and not the result of an interrogation or other compelling influences. Defendant neither admitted to the murder nor did he make any statements which revealed any criminal intent or admission of guilt. Given the totality of the circumstances, we find that Detective Davis "scrupulously honored" defendant's right to remain silent. She testified unequivocally that she read defendant his constitutional rights prior to him making any statements. He answered that he understood his rights and did not wish to speak. Detective Davis did not ask defendant any questions about the murder. Moments later, defendant voluntarily made the statements in question. Detective Davis did not interrogate or question defendant as he spoke or encourage him in any manner. Thus, we find that defendant voluntarily waived his right to remain silent when he made the exculpatory statements.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR 3 AND 4:

Defendant asserts the trial court erred first, by refusing to allow discovery of the full police investigative report instead of just the five page incident report prepared by Detective Bryon Adams and second, by denying him discovery of *Brady* material contained in the police investigative report.

THE POLICE REPORT:

La. R.S. 44:3(A)(1) and (4)(a) provides in pertinent part:

> "A. Nothing in this Chapter shall be construed to require disclosures of records, or the information contained therein, held by the offices of the attorney general, district attorneys, sheriffs, police departments, Department of Public Safety, marshals, investigators, correctional agencies, or intelligence agencies of the state, which records are:
>
> (1) Records pertaining to pending criminal litigation or any criminal litigation which can be reasonably anticipated, until such litigation has been finally adjudicated or otherwise settled: or
>
> * * *
>
> (4)(a) The records of the arrest of a person, other than the report of the officer or officers investigating a complaint, until a final judgment of conviction or the acceptance of a plea of quilty by a court of competent jurisdiction. *However, the initial report of the officer or officers investigating a complaint,* but not to apply to any follow up or subsequent report or investigation, records of the booking of a person as provided in

> Louisiana Code of Criminal Procedure Article 228, records of the issuance of a summons or citation, and records of the filing of a bill of information shall be a public record." (emphasis added).

The above statute declares as a public record the entire *initial report* of the officer or officers investigating a complaint. Any subsequent report, however, which concerns an investigation by police beyond investigating the complaint is not public record. *State v. Burnes,* 516 So.2d 375 (La. App. 4th Cir., 1987). Nevertheless, the reporting officer or officers may not defeat the purpose of the statute by including only selected information in the *initial report* and placing the remainder in a subsequent supplemental report. *State v. McEwen,* 504 So.2d 817 (La. 1987).

The investigative report complained of is not the initial police report of the complaint. Nothing in the record indicates that Detective Adams recorded only selected information in his initial report while recording the rest in a subsequent report so as to defeat the mandate of La. R.S. 44:3(A).

We find no error in the trial court's refusal to allow discovery of the entire police investigative report.

BRADY MATERIAL:

In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 1197 (1963), the United States Supreme Court held that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." See also, C.Cr.Pro. Art. 718.

Evidence is material, and hence discoverable, if there is a "reasonable probability" that the outcome of the trial

would have been different had the evidence been disclosed to the defense. *U.S. Bagley,* 473 U.S. 667, 105 S.Ct. 3375 (1985).

The undisclosed information must be evaluated in the context of the entire record; and if there is no reasonable doubt about defendant's guilt, irrespective of this evidence, there is no justification for a new trial. *State v. Paul,* 499 So.2d 1288 (La. App. 4th Cir. 1986), *writ den.,* 503 So.2d 475 (La. 1987).

Defendant aserts there is exculpatory evidence in the police investigative report that is material and should have been disclosed pror to trial.[4] Defendant argues that this evidence is material in that it creates a reasonable doubt

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[4] Defendant asserts:

First, there must have been some exculpatory evidence in other police reports because the police seized his shoes and the State failed to disclose why the shoes were seized.

Second, defendant surmises that the police found shoe or footprints at the murder scene and that his shoes were seized in an attempt to match them to the prints. Because the State did nto present evidence to this effect, defendant argues this evidence must have been favorable to him.

Third, defendant argues that he was deprived *Brady* material because if police reports had been produced he would have learned of a light colored hair found inside his hat. He claims that if he had been allowed to analyze the hair before it was lost, he could have shown that someone else wore the hat and that person was the person seen by officer Silbernagel. The hair was lost before it could be analyzed by the F.B.I. crime lab.

Fourth, defendant complains that when he received the full police report after trial, the report referred to large blood stains leading out of the two outside doors. Defendant argues that because there is no evidence the victim exited either of the doors, this supports his claim that someone else committed the murder.

which does not otherwise exist and which corroborates his version of the facts. He asserts that by denying him access to this evidence, the trial court deprived him of a fair trial. We disagree.

Defendant's assertions and arguments are speculation and supposition. The trial court conducted an *in camera* inspection of the full police investigative report and determined that it contained no *Brady* material. We have also reviewed the entire report and find no error in the trial court's ruling. Even if the report had been disclosed to defendant prior to trial, it does not constitute "material" evidence because, considering the information contained therein in the context of the entire record, it is highly doubtful that it would have created such a reasonable doubt so as to change the jury's verdict.

These asignments of error are without merit.

ASSIGNMENT OF ERROR 5:

Defendant asserts the trial court erred in admitting the testimony of Andy Williams to the effect that Mrs. Alden told him defendant shot her. Defendant argues that this statement does not fall within the excited utterance exception to the hearsay rule for two reasons. First, the amount of time which elapsed between the shooting of Mrs. Alden and her statement to Williams was not established. Second, Mrs. Alden's actions after being shot are indicative of reflective thought in that she lay of the floor feigning her death and contemplating what she should do to save herself. We disagree.

First, we are of the opinion Alden's statement to Williams is not hearsay. Louisiana Code of Evidence Article 801(C) defines hearsay as "a statement, other than one

made by the declarant while testifying at the present trial or hearing offered in evidence to prove the truth of the matter asserted." The article further provides that a statement is not hearsay if the declarant (Mrs. Alden) testifies at trial and is subject to cross-examination and the statement offered is "one of identification of a person made after perceiving him, and which confirms the testimony of the declarant that he made an identification ... ." La. C.E. Art. 801(D)(1)(c).

Alden's statement to Williams identifies defendant after she perceived him. She testified and was subject to cross-examination. According to the plain wording of Article 801 (D)(1)(c) her statement is not hearsay.

However, assuming arguendo the statement is hearsay, we also conclude it falls within the "excited utterance" exception. Louisiana Code of Evidence Article 803(2) defines the excited utterance exception to the hearsay rule as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."[5]

This exception requires an occurrence or event sufficiently startling to render the declarant's normal reflective

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[5] Author's Note (1) to this article in *Handbook on Louisiana Evidence Law*, Pugh, Force, Rault, and Triche (1990) states:

> "(1) The basis for this exception is the spontaneity of the declaration. To qualify under this exemption an out-of-court declaration must have been given while the declarant was under the influence of a 'startling event or condition' and it must relate to same. The time span between the event or condition and the utterance is thus broader than with declarations fitting under Article 803(1). Matters not 'relating' to the startling event or condition are inadmissible under this exception even though the declarant was under the stress of an exciting event or condition at the time he made the declaration."

thought processes inoperative. *State v. Reaves*, 569 So.2d 650 (La. 2nd Cir. 1990), *writ den.*, 576 So.2d 25 (La. 1991). Furthermore, the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought. *State v. Henderson*, 362 So.2d 1358 (La. 1978).

In determining whether the declarant was under stress of an excited event, the time span between the event and the statement is considered the most important factor. *State v. Reaves*, supra. The trial court must determine whether the interval between the event and the statement was of sufficient duration to permit a subsidence of emotional upset and a restoration of a reflective thought process. *State v. Henderson*, supra.

Other factors which may indicate that a statement was the result of reflective thought, but which do not automatically justify exclusion, are: (1) evidence that the statement was self-serving or made in response to an inquiry; expansion of the excited utterance beyond a description of the event and into past or future facts; and proof that, between the event and the statement, the declarant performed tasks requiring reflective thought processes. *State v. Henderson*, supra.

Being struck on the head and shot three times are certainly startling or exciting events sufficient enough to render Mrs. Aldens's reflective thought process inoperative. The record reflects that a relatively short period of time passed between the shooting and the statement. Mrs. Alden testified that she telephoned Judith Held at Symmetry Jewelers at approximately 11:50 a.m. Following this call, Mrs. Alden stated she and defendant conversed for several minutes before she was shot. This would establish the probable time of the shooting to be sometime

past noon. Williams called 911 at 12:37 p.m., after Mrs. Alden entered his home and told him what had happened. Thus, it appears that probably less than thirty minutes elapsed between the time she was shot and her statement to Williams that defendant shot her.

While the record indicates that Mrs. Alden had enough presence of mind to reign her death and contemplate the best course of action to save herself, she was still under the influence of an excited event. Mrs. Alden testified she was within inches of defendant when he shot her. As she lay of the floor she was terrified of bleeding to death and of defendant returning to kill her. Furthermore, she heard the altercation between defendant and her son and heard her son's screams. Thus, we find the record fully supports the conclusion that Mrs. Alden's reflective processes were rendered inoperative and that her statment was a spontaneous reaction to a "startling event."

This assignment of error is without merit..

ASSIGNMENT OF ERROR 6:

Defendant asserts that the trial court erred in admitting into evidence the search warrant for defendant's shoes. Defendant argues the warrant contains inadmissible hearsay.

A review of the record shows the warrant was not placed in evidence nor was it shown to the jury. It was merely filed in the record of these proceedings.

There is no prejudice, and thus no merit to this assignment.

ASSIGNMENT OF ERROR 7:

Defendant asserts the trial court erred in allowing a double hearsay statement into evidence thus denying him a fair trial.

At trial, defendant called Dr. Al Yonovitz, an expert in speech and hearing sciences. At defendant's request, Dr. Yonovitz had prepared videotapes and written transcripts of Andy Williams' 911 call, the victim's 911 call and the police broadcast tape of the events surrounding the police response to the initial complaint. During direct examination, defendant introduced a portion of the broadcast tape that corroborated Officer Silbernagel's testimony that he radioed to fellow officers that he saw two different people in the Alden residence. This portion of the tape was played for the jury. On cross-examination, however, the State sought to introduce another portion of the tape containing an unrelated statement by another police officer, to wit, "all right, the nurse tells me that the perpetrator is Ben Baker." Defendant objected to the statement as hearsay. The trial court overruled the objection and allowed the entire protion, including the complained of statement, to be played before the jury.

Evidence of an out-of-court statement offered to prove the truth of the statement is hearsay and inadmissible. La. C.E. Art. 802; *State v. Joseph*, 425 So.2d 1261 (La. 1983).

Hearsay evidence rests its value upon the credibility of the out-of-court asserter. *State v. Martin*, 356 So.2d 1370 (La. 1978).

The primary justification for the exclusion of hearsay is that the adversary has no opportunity to cross-

examine the absent declarant to test the accuracy and completeness of the testimony. *State v. Wille,* 559 So.2d 1321 (La. 1990).

The evidence in question is clearly hearsay and does not fall under any of the hearsay exceptions set forth in La. C.E. Arts. 803 and 804. Nevertheless, we find that the erroneous admission of that statement does not require reversal of defendant's conviction because the error is harmless. Reversal is mandated only when there is a possibility that the evidence might have contributed to the verdict. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967).

Mrs. Alden, the declarant, testified that defendant shot her. She was subject to cross-examination. Thus, even though she made the same statement to the nurse, who in turn told the police, she was subject to defendant's scrutiny of that statement. The veracity of the declarant's statement did not go unchecked.

Although defendant argues this statement had a prejudicial "cumulative" effect on the jury, we disagree. Defendant attacked the credibility of Mrs. Alden's statements during cross-examination and though the testimony of other witnesses. The jury heard all of this evidence and was free to believe or disbelieve Mrs. Alden. In light of all the evidence attacking her credibility, we find no prejudice in the erroneous admission of this hearsay statement.

This assignment of error is without merit.

ASSIGNMENT OF ERROR 8:

Defendant asserts there was insufficient evidence to

support his conviction. Specifically, defendant argues that the State failed to prove that he murdered Michael Alden, Jr. because ho direct evidence was presented that he shot and stabbed the victim and the circumstantial evidence was insufficient to exclude every reasonable hypothesis of innocence.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979); *State v. Fuller,* 414 So.2d 306 (La. 1982).

Nevertheless, the reviewing court may not disregard its duty to consider whether the evidence is constitutionally sufficient simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall,* 523 So.2d 1305 (La. 1988).

When the conviction is based on circumstantial evidence, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438; *State v. Camp,* 446 So.2d 1207 (La. 1984). This is not a stricter standard of review, but rather an evidentiary guide for the jury when it considers circumstantial evidence. *State v. Porretto,* 468 So.2d 1142 (La. 1985). If a rational trier of fact reasonably rejects the defendant's hypothesis of innocence, that hypothesis fails. Unless another hypothesis creates reasonable coubt, the defendant is guilty. *State v. Captville,* 448 So.2d 676 (La. 1984).

Defendant was convicted of the first degree murder of Michael Alden, Jr. committed during the perpetration or attempted perpetration of armed robbery. Defendant

asserts that no rational trier of fact could have concluded that he was the murderer because the circumstantial evidence presented by the State did not exclude every reasonable hypothesis of innocence, specifically, that someone else committed the murder. We disagree.

> The elements of the offense are:
>
> (1) the killing of a human being;
>
> (2) when the offender has the specific intent to kill or to inflict great bodily harm;
>
> (3) and is engaged in the perpetration or attempted perpetration of armed robbery. La. R.S. 14:30.

Mrs. Alden testified that she operated a jewelry business from her home. Defendant came to her home on November 2, 1988 to pick up some old books. Mrs. Alden turned the burgler alarm off, let defendant in, and then reset the alarm. Defendant requested that Mrs. Alden not answer the telephone. A request which she refused. During the course of their conversation, defendant asked to see certain items of jewelry that Mrs. Alden kept locked in a vault. After allowing defendant to see the jewelry, Mrs. Alden returned it to the vault. Unable to decide if he wanted a particular gold and diamond necklace, defendant asked to see it several more times. Each time, Mrs. Alden removed the necklace from the vault, showed it to defendant and returned it to the vault. Finally, defendant told Mrs. Alden he wanted to buy the necklace. As she removed it from the vault, she was struck on the head. As she turned she saw defendant standing behind her. He then shot her three times. Mrs. Alden stated:

> "I stayed for a while, and I wanted to make sure I didn't hear any shuffling around. And he kind of

> kicked me on the way out. And I heard a door or a drawer opening and then I heard somebody either coming in or out of the room. And it sounded like the noise was coming toward me. And I said, 'Thank God. Michael is going to come and save me.' Then all of a sudden I heard young Mike yell, 'Who? What?' And there was a pause, and then there was a plunge. And I heard this horrible scream. And then there was quiet. And then there was another plunge. And then there was another horrible scream."

Defendant testified that when Mrs. Alden went to answer the telephone, he was struck from behind. As he reached for his gun, the assailant took it from him and knocked him unconscious. When he awoke he saw the assailant dragging the victim by the hair. The assailant let the victim go and kicked defendant in the groin knocking him unconscious. When he awoke, he found the victim laying on the floor. He attempted to pick the victim up but he was too heavy. He then exited the front door and was arrested.

Clearly, the jury believed Mrs. Alden's testimony and not that of defendant. Defendant's version of what happened is simply not credible. None of the police officers who surrounded the house saw anyone other than defendant exit the house. Moreover, it is difficult to believe that the alleged assailant would so viciously attack Mrs. Alden and her son but leave defendant relatively unharmed. Furthermore, defendant's explanation of why he changed the license plate on his car and covered the brake tag is difficult to believe.

Thus considering the evidence in the light most favorable to the prosecution to the exclusion of every reasonable hypothesis of innocence, a rational trier of fact

could have found defendant guilty beyond a reasonable doubt.

This assignment of error is without merit.

ASSIGNMENTS OF ERROR 9 AND 10:

Defendant asserts the trial court erred in denying his motion for a new trial based upon allegations of jury tampering and in not allowing him to call jurors as witnesses in support of his motion.

On the third day of trial, the jurors were returned by sheriff's deputies to the Quality Inn where they were sequestered. Defendant contends that a female juror was seen consorting with Kent Browning, a patron of the hotel bar. Browning allegedly placed his arm around the juror and told her he was a plain clothes deputy providing security for the jury. At the hearing on the motion for a new trial, Browning denied approaching, touching or talking to any of the jurors. He admitted that he did not work for the sheriff's department but that he told Wanda Pillault, a singer at the hotel, that he was there to guard the jury. He also testified that none of his companions spoke to or made any gestures to the jury; that he did not know the Aldens and had no personal knowledge or interest in the case. Both Wanda and Emmett Pillault, entertainers at the hotel, testified that they saw Browning approach a female juror who was peeking into the bar to catch a glimpse of Emmett Pillault's "Elvis routine." However, neither witness was able to testify to any verbal communication that took place between the juror and Browning.

Deputy Carl DeJoie and Deputy Laura Rhodes, who had excorted the jurors, both testified. Deputy DeJoie stated that after he was made aware of the incident by

Wanda Pillault, he questioned Browning. Browning admitted to him that he spoke to the juror and put his arm around her but only told her he was a security guard. DeJoie testified that he didn't admonish Browning because he felt "it wasn't that important because he [Browning] didn't say anything about the case to anyone." Deputy Rhodes testified that the jurors were walking to the dining room when the incident took place. She stated that she did not see any juror stop and converse with anyone.

The trial judge's decision on a motion for a new trial rests within his sound discretion; he is accorded considerable latitude in evaluating the evidence and its potential impact on the verdict; and his ruling wil not be disturbed on appeal in the absence of a showing of abuse of that discretion. *State v. Molivario,* 400 So.2d 596 (La. 1981).

Any unauthorized communication made by a nonjuror to a juror during trial about the matter pending before the jury is deemed presumptively prejudicial. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450 (1954); *State v. Wisham,* 371 So.2d 1151 (La. 1979), appeal after remand, 384 So.2d 385 (La. 1980); *State v. Marchand,* 362 So.2d 1090 (La. 1978). However, a new trial is warranted only upon a showing that a constitutional violation occurred and a reasonable possibility of prejudice exists. *Durr v. Cook,* 589 F.2d 891 (5th Cir. 1979).

After a review of the record we find the trial court did not abuse his discretion in denying the motion for a new trial. At best the record indicates Browning made a clumsy attempt at flirtation. No evidence was presented that indicated he was in any way attempting to influence the jury's deliberations.

Louisiana Code of Evidence Article 606(B) provides:

> "B. Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (emphasis added).

In the instant case, no showing to this effect was made. No evidence was presented that the case was discussed or that the juror was influenced against the defendant.

These assignments of error are without merit.

ASSIGNMENT OF ERROR 11:

Defendant asserts he has been denied his right to a meaningful appeal because portions of the trial court proceedings were not transcribed and made part of the record, to wit: his objections to the sequestration order and instructions to the jury; his objections to having to work until the "wee hours of the morning" and the trial court's instructing the jurors that they could buy alcoholic drinks at

the hotel. In support of his complaint defendant cites Article 1, Section 19 of the Louisiana Constitution and C.Cr.P. Article 843.[6]

The burden of proving that the appellate record is incomplete is upon the defendant. *State v. Palrean*, 395 So.2d 687 (La. 1981).

In the instant case, defendant fails to provide any evidence that omissions in the trial transcript occurred. Defendant only makes bare allegations with no corroborating evidence.[7]

The record shows that on the second day of trial, defense counsel objected to working late. This objection was noted. No other such objections are found in the record. Even assuming that other objections were made and not recorded, defendant has not stated how his substantive rights were affected. C.Cr.Pro. Article 921.

---

6 "Section 19. No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law."

Art. 843. Recording of proceedings

In felony cases, and on motion of the court, the state, or the defendant in misdemeanor cases tried in a district, parish, or city court, the clerk of court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders and changes by the court, and objections, questions, statements and arguments of counsel."

7 Other cases addressing this question contain evidence that actual omissions occurred such as absence of the court reporter, failure of the recording equipment or defects in the transcript. See, *State v. Ford*, 338 So.2d 107 (La. 1976); *Rooney*, 187 L. 256, 174 So. 348 (La. 1937).

Defendant complains that his objections to the trial court's sequestration order and instructions to the jury were not recorded. However, defendant provides no specifics as to how the sequestration order or instructions constituted reversible error.[8]

Finally, defendant asserts the trial court instructed the jurors that they could by alcoholic drinks at the hotel and that this instruction was omitted from the record. Even assuming arguendo that such an instruction was made, defendant has not established that any of the jurors consumed alcohol and that prejudice resulted. In fact, at the evidentiary hearing on the jury tampering issue, the testimony was clearly to the effect that no jurors entered the bar or consumed alcoholic beverages.

Thus, defendant has not shown that any omissions occurred in the record requiring reversible error.

This asignment of error is without merit.

ASSIGNMENT OF ERROR 12:

Defendant asserts the trial court erred in admitting into evidence prior consistent statements made by Mrs. Alden to her friend Judith Held because the State failed to lay the proper foundation as required by Louisiana Code of Evidence Article 801(D)(1)(b). See also, *State v. Marcal*, 388 So.2d 656 (La. 1980), cert. den. 451 U.S. 977, 101 S.Ct. 2300

---

[8] From the context of his argument, it appears that defendant is not complaining about objections to the jury charges because these were recorded but to what the trial court told the jurors what they could or could not do while the trial was in progress.

(1981).[9]

At the trial, defense counsel extensively cross-examined Mrs. Alden as to the conversation she had at the hospital with Judith Held. The defense attempted to diminish Mrs. Alden's credibility by showing that Judith Held convinced Mrs. Alden that defendant had to be the perpetrator because he was the only person in the house who could have shot her. Hence, defendant clearly intended to show that Mrs. Alden's testimony that defendant was the perpetrator was improperly influenced by Judith Held.

The record reflects that Mrs. Held testified during the rebuttal portion of the State's case to the effect that she visited Mrs. Alden at Tulane Medical Center the evening of the murder and that Mrs. Alden kept repeating that as she was getting something out of the safe to show defendant, she was struck on the head. As she turned she saw defendant's face "as if it wasn't Ben's face though." She told Mrs. Held that defendant had a strange look on his face and that he shot her.

Defendant objected to Mrs. Held's testimony as repetitious because Mrs. Alden had already testified to what she told Mrs. Held. The objection was overruled.

A defendant must make known the grounds for his objection. La. C.Cr.P. Art. 841. He is limited on appeal to those grounds articulated at trial and must point to the

---

[9] Comments (b) of 801 (D)(1)(b) states this article is not intended to effect any substantial practical change in Louisiana law which has consistently required that a foundation be laid by a party who wishes to use a prior consistent statement for the purpose of rehabilitation. La. R.S. 15:496 referred to in *Marcal* was repealed by Acts 1988, No. 515, Section 8 and replaced by La. C.E. Art. 801 et. seq. eff. January 1, 1989.

specific error so that the trial court has the opportunity to make the proper ruling and prevent or cure any possible error. *State v. Jackson*, 450 So.2d 621 (La. 1984); *State v. Mitchell*, 572 So.2d 800 (La. App. 4th Cir. 1990), writ den. 576 So.2d 47 (La. 1991).

On appeal defendant articulates a different basis for his objection than articulated at trial. At trial he objected on the grounds that Mrs. Held's testimony was repetitive. On appeal he complains of a lack of a proper foundation as required by La. C.E. Art. 801 (D)(1)(b).

As defendant failed to raise the specific objection to lack of a proper foundation as required, we find defendant effectively waived any objection to the testimony on those grounds and cannot now raise it on appeal.

This assignment of error is without merit.

ORAL ASIGNMENT OF ERROR:

During argument, defendant complains that the court erroneously instructed the jury on reasonable doubt, i.e. a "Cage" charge. Hosever, defendant admits there was no contemporaneous objection. This Court, in *State v. Dobson*, 90-KA-2112 (April 10, 1991) held that, absent a proper objection arguments on improper jury charges would not be considered.

This assignment is without merit.

For the reasons assigned above, defendant's conviction and sentence is affirmed.

AFFIRMED

APPENDIX B

DENIAL OF REHEARING

The Court of Appeal denied Appellant's Request for Rehearing on August 27, 1991 without written reasons, as will appear from the Notice of Denial, a copy of which appears below.

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans **AUG 27 1991**

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

STATE OF LOUISIANA v. **GERALD BAKER**

No. **90-KA-0558**

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX C

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 91-K-2201

GERALD BERNARD BAKER

— — — — — —

IN RE: Baker, Gerald; — Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 90KA-0558; Parish of Orleans Criminal District Court Div. "H" Number 330-597

— — — — — —

January 10, 1992

Denied.

JCW
JLD
LFC
PH

CALOGERO, C.J., MARCUS & LEMMON, J.J., would grant the writ.

Supreme Court of Louisiana
January 10, 1992

/s/ illegible

Clerk of Court
For the Court

APPENDIX D

Supreme Court of the United States

No. A-728

Gerald Bernard Baker,
Petitioner

v.

Louisiana

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including **May 11**, 1992.

/s/ Antonin Scalia
Associate Justice of the Supreme
Court of the United States

Dated this **3rd**
day of April, 1992.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
Clerk of the Court

AREA CODE 202
479-3011

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APPENDIX E

STATE OF LOUISIANA
IN THE FOURTH CIRCUIT COURT OF APPEAL
CASE NO. 90-KA-0558

STATE OF LOUSIANA
Appellee

VERSUS

GERALD BERNARD BAKER
Appellant

ON APPEAL FROM THE
CRIMINAL DISTRICT COURT,
PARISH OF ORLEANS,
CASE NO. 330-597, SECTION "H",
THE HONORABLE JAMES McKAY,
PRESIDING JUDGE

APPLICATION FOR REHEARING

SUBMITTED BY:

LEROY A. HARTLEY
Attorney for Appellant
GERALD BERNARD BAKER
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APPLICATION FOR REHEARING

The defendant herein, Gerald Bernard Baker, appearing through undersigned counsel, LeRoy A. Hartley, does hereby file an Application for Rehearing of the above entitled captioned matter of this Honorable Court's decision of May 30, 1991, pursuant to Uniform Rules - Courts of Appeals, 2-18.

Undersigned counsel for the Defendant respectfully represents that this Application for Rehearing is addressed to two issues raised on appeal and decided by this Honorable Court in its decision of May 30, 1991:

1) Whether the Trial Court erred in refusing the Defendant's subpoena request for the medical and psychological records of the State's chief witness; and

2) Whether the Trial Court erred in charging the jury as to the meaning of "reasonable coubt."

CONTENTION NO. 1

The medical and psychological records of the State's chief witness are clearly admissible and this matter should be remanded to the Trial Court for a review of said evidence and a new trial.

In its opinion of May 30, 1991, this Honorable Court found Defendant's Specification of Error No. 1 (the Trial Court's refusal to permit discovery of medical and psychological records of Mrs. Rhoda Alden, the State's Chief Witness) to be without merit, "because [the records sought] did not constitute evidence of her general reputation for truthfulness."

This Court's emphasis on LSA - C.Cr.P., Art. 608 ("Reputation Evidence and Character") is misplaced. As

pointed out in Defendant's brief, the evidence sought was not intended to prove the witness's *reputation* for telling the truth, but to prove that the witness suffered from a mental abnormality or sickness at the time of the offense for which Defendant is charged, and at the time of trial, which abnormality or sickness would clearly be relevant to her "capacity, accuracy of perception, and any other factor affecting the determination of whether the testimony accords with reality." LSA - C.Cr.P., Art. 607, Comment (c). Accordingly, it is clearly admissible under LSA - C.Cr.P., Art. 607(D). *State v. Morris,* 429 So. 2d 111 (La. 1983).

This Court's reliance on the physician-patient and psychologist-client priviledges (LSA - R.S. 15:476 and LSA - R.S. 37:2362, respectfully) is also misplaced. These privileges are statutory creations and are to be narrowly construed. *Boulware v. Boulware,* 153 So. 2d 182 (La. App. 2nd Cir. 1963). The priviledge is personal to the patient or client and may not be asserted by any other party.[1] LSA - R.S. 15:478. Moreover, where the patient is not a party to the proceedings, it is even questionable whether the patient has standing to assert the privilege. *State v. Romero,* 533 So. 2d 1264 (La. App. Cir. 1988). In those cases where a patient has been allowed to raise the issue in a proceeding to which the patient is not a party, the Court has inspected the records in-camera to determine if they contain any material which might be relevant to the defense. *State v. Davis,* 562 So. 2d 1173 (La. App. 4th Cir. 1990).

In this case, there is no evidence in the record that the priviledge was ever asserted by Mrs. Rhoda Alden, whose medical records were sought. Rather the issue of

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[1] In the absence of evidence to the contrary, a psychologist is presumed to be authorized to claim the priviledge on behalf of the patient or client. LSA - R.S. 37:2362(B).

privilege was raised only by the State, which has no standing to raise it. Moreover, the Trial Court did not allow a Subpoena for the records to issue at all, and consequently, neither reviewed the records for evidence relevant to the defense, nor preserved said records under seal for this Honorable Court to review. *State v. Davis,* supra.

Parenthetically, since the trial of this matter, it has been established (by her own admission under oath) that Mrs. Alden was indeed under the care of a psychiatrist at the time of the offense and under the care of a psychologist at the time of trial. When ordered by the Civil District Court for the Parish of Orleans to undergo an independent psychiatric examination in connection with a civil case brought by the Aldens concerning the same offense for which Defendant has been charged, the Aldens chose to preserve Mrs. Alden's privilege by dismissing said suit with prejudice.

Because the Trial Court failed to review the medical and psychological records of Mrs. Alden, the Trial Court and this Court are unable to determine whether the records sought would be "material to the Defendant's guilt or punishment and whether, if the evidence were suppressed, the Defendant would be deprived of a fair trial." *State v. Davis,* supra at 1176, citing *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Accordingly, this case should be remanded and the Defendant granted a new trial, or, at least, the records reviewed to determine whether a new trial is warranted. Alternatively, this Honorable Court should itself subpoena the said records in order to determine whether relevant evidence exists therein sufficient to affect the outcome of the trial.

CONTENTION NO. 2

The contemporaneous objection rule should not be employed to deny the Defendant the right to complain of a jury charge [the "Cage" charge] which has been determined to be violative of fundamental due process.

At oral arguments, undersigned counsel raised the issue of the correctness of the Trial Court's charge to the jury on the definition of "reasonable doubt." This Honorable Court, in its opinion of May 30, 1991, dismissed the issue out of hand on the basis of the comtemporaneous objection rule. Because of the constitutional proportions of the error, however, it is respectfully submitted that the contemporaneous objection rule does not apply.

It is conceded that the general rule with regard to jury instructions is that, absent a contemporaneous objection, which affords the Trial Court the opportunity to make corrections, an Appellate Court will not review a jury charge for error. However, where the error complained of "is of such importance and significance as to violate fundamental requirements of due process," the reviewing court has the power to review the charge. *State v. Williamson*, 389 So. 2d 1328, 1331 (La. 1980); *State v. Green*, 493 So. 2d 588 (La. 1986); *State v. Holland*, 544 So. 2d 461 (La. App. 2nd Cir. 1989). The alternative is to wait and consider the issue in connection with the filing of a writ for habeas corpus. *State v. Williamson*, supra.

In this case, the jury was charged with the now famous "*Cage*" charge on the definition of "reasonable doubt".[2] In the case of *Cage v. Louisiana*, ____ U.S. ____,

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[2] At the time that this Defendant was tried, all but one of the Judges of the Criminal District Court in and for the Parish of Orleans were

111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), the U.S. Supreme Court ruled that the charge in question violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it would allow a reasonable juror to have "interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." 111 S. Ct. 330. In striking down the charge, the United States Supreme Court began its discussion by noting the basic, fundamental role of the reasonable doubt standard to a fair trial:

> In state criminal trials, the due process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25

(footnote 2 continued)

using the following explanation of "reasonable doubt":

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

The transcript in this matter does not contain the Judge's charge to the jury, nor did the defense counsel specifically object to the language used by the Trial Court in explaining the phrase, "beyond a reasonable doubt." However, undersigned counsel represents that the charge given was substantially identical to the "*Cage*" charge.

> L.Ed.2d 368 (1970); see also *Jackson v. Virginia*, 443 U.S. 307, 315-316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). This reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 357 U.S. at 363, 90 S. Ct. at 1072. Among other things, "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *Ibid.* The issue before us is whether the reasonable doubt instruction in this case complied with *Winship*.

As can be seen from the above quote, it is absolutely clear that the United States Supreme Court felt that the "*Cage*" charge was an error "of such importance and significance as to violate fundamental requirements of due process." *State v. Williamson*, supra, at 1331. Accordingly, it is clear that the jury instruction at issue falls within the *Williamson/Green* exception to the contemporaneous objection rule.[3]

Finally, undersigned counsel realizes that it is his burden to convince this Court that the trial counsel's failure to object to the charge was excusable and not the result of trial strategy. *State v. Holland*, supra. However, as this Court is aware, in August of 1989 the above charge had been upheld by this Court and the Louisiana Supreme Court numerous times. In fact, in November of 1989, the Louisiana Supreme Court again, in *State v. Cage*, 554 So. 2d 39 (La. 1989), approved this charge in a capital murder

---

[3] Undersigned counsel is aware of this Honorable Court's recent decision in the case of *State v. Dobson*, No. 90-KA-2112, wherein this Honorable Court applied the contemporaneous objection rule to preclude the review of a "*Cage*" charge. However, this Honorable Court directed its attention to the "plain error" doctrine, which undersigned counsel feels missed the point. Under *Williamson* and *Cage*, it is clear that the *Cage* charge is an error so fundamental as to be an exception to the contemporaneous objection rule.

case. Writs were filed in that case with the United States Supreme Court and they were granted. It was not until November of 1980 that the decision of the United States Supreme Court in that matter was handed down and the matter remanded to the Louisiana Supreme Court. Therefore, undersigned counsel, at the time of trial, felt that the issue of the correctness of the standard jury charge given in Criminal District Court for the Parish of Orleans had been settled, and any objection thereto would have been frivolous. It clearly was not a calculated gamble.

CONCLUSION

Undersigned counsel would respectfully urge this Honorable Court to grant this Application for Rehearing, order that the Trial Court provide the Court of Appeal with a complete transcript of the jury charges read to the jury on August 25, 1989 by the Honorable James McKay and allow the Defendant the opportunity to brief these issues for this Court.

Undersigned counsel would also respectfully urge that either this Court or the Trial Court review the medical and psychological records of Mrs. Rhoda Alden and that this matter thereafter be remanded for a new trial.

Respectfully submitted:

/s/ Leroy A. Hartley

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91-1839

NO. (3)

FILED
MAY 11 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

GERALD BERNARD BAKER
Petitioner

VERSUS

STATE OF LOUISIANA
Respondent

A PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, CASE NO. 91-K-2201 APPLICATION FOR GERALD BERNARD BAKER

APPENDIX
VOLUME II

SUBMITTED BY:

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APPENDIX F

SUPREME COURT OF LOUISIANA

CASE NO.

STATE OF LOUISIANA

VERSUS

GERALD BERNARD BAKER

APPLICATION FOR WRIT OF CERTIORARI, OR REVIEW, TO REVIEW A JUDGMENT OF THE COURT OF APPEALS, FOURTH CIRCUIT, STATE OF LOUISIANA

SUBMITTED BY:

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STATEMENT OF THE CASE

On the morning of Wednesday, November 2, 1988, Michael Alden, Jr. was fatelly shot and stabbed in his home at 7711 Redfish Street, New Orleans, Louisiana. his mother, Rhoda Alden, was also shot three times, but she managed to leave the house and call the police from a house next door. The Defendant, Gerald Bernard Baker, was arrested at the scene and charged with First Degree Murder, Attempted Murder and Attempted Armed Robbery.

On December 1, 1988, the State of Louisiana filed a Bill of Indictment returned by the Orleans Parish Grand Jury Charging the Defendant, Gerald Bernard Baker, with a violation of La. R.S. 14:30, relative to the offense fo First Degree Murder. A four-day jury trial took place on August 22 - 25, 1989, which resulted in the Defendant's conviction as charged. Following a sentencing hearing, the jury recommended that the Defendant be sentenced to life imprisonment. On November 30, 1989, the Trial Court officially sentenced the Defendant to serve life imprisonment at hard labor without benefit of parole, probation or suspension of sentence.

The verdict was appealed to the Fourth Circuit Court of Appeal pursuant to Article V, §10 of the Louisiana Constitution of 1974. By decision of May 30, 1991, the Fourth Circuit Court of Appeal affirmed the verdict and sentence and the Defendant applied for a Rehearing. The Application for Rehearing was denied on August 27, 1991, without written reasons.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred in affirming the Trial Court's decision to deny Defendant's Application for Writ of Subpoena Duces Tecum seeking the psychological and psychiatric records of Rhoda Alden.

II. The Court of Appeals erred in ruling that the police investigative report sought by Defendant contained no *Brady* material.

III. The Court of Appeals erred in applying the Contemporaneous Objection Rule to Defendant's claim that the jury charge given by the Trial Court as to the definition of "reasonable doubt" (The *Cage* charge) was violative of his Constitutional rights.

IV. The Court of Appeals erred in ruling that the admission of a portion of a police audio tape containing double hearsay implicating the Defendant, although erroneous, was harmless.

V. The Court of Appeals erred in upholding the Trial Court's decision not to allow the defense to call a juror to testify at the Hearing of Defendant's Motion for a New Trial.

ARGUMENT

FACTS AND EVIDENCE

The victim was killed in his home at 7711 Redfish Street on the morning of November 2, 1988. It is undisputed that the Defendant, Gerald Bernard Baker, was in the house at the time, having been invited there by Mrs. Rhoda Alden, the victim's mother. What is not clear, is whether anyone else was — or could have been — in the house at the time of the murder. The only two known witnesses (other than the deceased victim), the Defendant and Mrs. Alden, gave divergent accounts. All other evidence presented at trial was merely circumstantial evidence tending to support either one or the other of these two accounts.

Rhoda Alden contends that on November 2, 1988, the defendant made an appointment to see her at her house for 10:00 a.m. regarding numerous books she was giving away. (Trial Transcript, p. 399). The defendant arrived at 9:15 a.m. Mrs. Alden turned off the house alarm system and let the Defendant inside. (Trial Transcript, p. 399 - 401). Once seeing the defendant was inside, Mrs. Alden alleges that she re-set the alarm. (Trial Transcript, p. 403).

Mrs. Alden contends that she and the defendant engaged in general conversation during which the defendant on several occasions asked to see particular items of jewelry Mrs. Alden had for sale. (Trial Transcript, p. 404, 421-424). Mrs. Alden directed the defendant's attention to several boxes of books located in the middle room of the house. She informed the defendant that her son Michael was present in the house. (Trial Transcript, p. 426-428). The defendant carried the books to the den and sorted out the ones he wanted. (Trial Transcript, p. 428-429). During this

time, the defendant allegedly again requested to see a particular necklace (Trial Transcript, p. 430). Mrs. Alden went to the vault and opened the safe, during whch she sustained a blow to her head which caused her to "see stars." (Trial Transcript, p. 430). Mrs. Alden called out "Ben" as she turned around, allegedly seeing the defendant, although she admits that his face was "distorted." (Trial Transcript, p. 486). The defendant was allegedly holding a gun in his right hand and had his left had covering the barrel and started shooting, hitting Mrs. Alden three times, causing her to fall to the ground. (Trial Transcript, p. 431).

Mrs. Alden claims to have stayed on the ground feigning unconsciousness. (Trial Transcript, p. 435). She then heard a struggle, accompained by a succession of screams. (Trial Transcript, p. 435). Mrs. Alden got up, allegedly turned off the alarm system and left her house via the side door. (Trial Transcript, p. 436-437). She ran down the carport to the house of a neighbor, Andy Williams. She told him the defendant has shot her and was going to kill her son. The neighbor called 911 and went outside to await the police (Trial Transcript, p. 437 - 439). Soon the police arrived and eventually spoke to Mrs. Alden and took her to the hospital. (Trial Transcript, p. 439). There she learned her son was dead. (Trial Transcript, p. 440).

The defendant, Gerald Bernard "Ben" Baker, testified that he had lived in New Orleans since 1961. He and his wife began a business called Frames, Inc. and he was also involved with several other small businesses. (Trial Transcript, p. 945-948). He took up hypnotism as a hobby to help solve people's problems. (Trial Transcript, p. 949-950). During the last two years, he met Mrs. Alden and agreed to use his hobby to help her lose weight. (Trial Transcript, p. 952-953).

The defendant testified that he went to the Alden house to look at numerous books that Mrs. Alden intended to discard. (Trial Transcript, p. 954). The appointment, however, was for 9:00 a.m., not 10:00 a.m., with the defendant arriving 15 minutes late. (Trial Transcript, p. 956). He testified that it was Mrs. Alden's idea to show him some jewelry. (Trial Transcript, p. 964). At one point, Mrs. Alden answered the phone during which her dogs, which had gotten out when the defendant entered, appeared by the door. The defendant let the dogs inside without tripping the alarm system, apparently because the system wasn't on. (Trial Transcript, p. 966-967).

During this time, Mr. Baker and Mrs. Alden sorted out the books for which he came. At about noon, the phone rang and Mrs. Alden answered it in her office. (Trial Transcript, p. 971). The defendant sat down and began to pet one of the dogs. Soon he was startled and turned to see a dark-complected man who struck the defendant on the head knocking him out of his chair. (Trial Transcript, p. 971). The subject struck the defendant several times as the defendant attempted to retreve his gun from his briefcase. The assailant managed to get the gun from the defendant and again struck the defendant, knocking him unconscious. (Trial Transcript, p. 972-973). He did not know how long he was knocked out. (Trial Transcript, p. 973).

When he came to, Baker went to the hallway to find his assailant dragging Mrs. Alden's son, Michael Alden, Jr., down the hallway. The subject again struck the defendant, again causing him to pass out. (Trial Transcript, p. 973). The defendant eventually located his spare glasses in his briefcase, the first pair having been knocked off his face in the original scuffle (and never found), and stumbled out the front door. He was grabbed by the police, who calmed him down and placed him in a police car. (Trial Transcript,

p. 975). The defendant denied knowing what happened to Mrs. Alden (Trial Transcript, p. 975), denied shooting or killing anyone (Trial Transcript, p. 977-978), and denied wishing to take anything from the Alden's home. (Trial Transcript, p. 977). He specifically stated he was in another room when Mrs. Alden was shot. (Trial Transcript, p. 978). He also stated his disbelief over hs arrest and his trial for murder. (Trial Transcript, p. 984).

ASSIGNMENT OF ERROR NO. I

The medical and psychological records of the State's chief witness are clearly admissible and significant and this matter should be remanded to the Trial Court for a new trial.

In its opinion of May 30, 1991, the Court of Appeal found Defendant's Specification of Error No. 1 (the Trial Court's refusal to permit discovery of medical and psychological records of Mrs. Rhoda Alden, the State's Chief Witness - See Minute Entry of 12/22/88, attached hereto as Exhibit C and transcript of the Motion Hearing dated 12/22/88, page 23-25) to be without merit, "because [the records sought] did not constitute evidence of her general reputation for truthfulness."

The Court of Appeal's emphasis on LSA - C.Cr.P., Art. 608 ("Reputation Evidence and Character") is misplaced. As pointed out in the Defendant's brief, the evidence sought was not intended to prove the witness's *reputation* for telling the truth, but to prove that the witness suffered from a mental abnormality or sickness at the time of trial, which abnormality or sickness would clearly be relevant to her "capacity, accuracy of perception, and any other factor affecting the determination of whether the testimony accords with reality." LSA - C.Cr.P., Art. 607, Comment (c). Accordingly, it is clearly admissible under LSA - C.Cr. Art. 607(D). *State v. Morris*, 429 So. 2d 111 (La. 1983).

In addition, the evidence sought was intended to impeach the witness directly, by proving prior statements inconsistent with her testimony at trial. If the witness has related to her psychiatrist or psychologist a different version of events than that which she related to the police and the jury, that fact would clearly be relevant to the Defendant's defense and would be admissible under LSA - C.E., Art. 607(D)(2) as a prior inconsistent statement.

The Appellate Court's belief that the only type of evidence allowed under Art. 607 is that which is specially allowed under Art. 608 et seq., is not borne out by the jurisprudence or by the Code itself. On the contrary, the Code suggests just the opposite. Commet (1) to Article 607 states:

> Paragraph D, by its terms, is applicable only to extrinsic evidence. It does not represent a major departure from prior Louisiana law, the common law in general, or the approach adopted in the federal rules. Evidence sufficiently relevant to the issues of the case under Article 403 is admissible regardless of whether or not it contradicts a prior witness. Whether evidence of a witness's conviction of crime is admissible is determined by the self-contained rules of Article 609 and 609.1. **All other extrinsic contradictory evidence is admissible unless it is not sufficiently relevant on the issue of credibility to pass the test created by this Article.** The factors listed here are but a shorthand equivalent of the more detailed offsetting factors listed in Article 403. See C. McCormick on Evidence §47 (3d ed. 1984). (Emphasis added).

Moreover, Comment (m) provides:

> It is sometimes the case, in criminal cases, that

> an accused's constitutional right of confrontation militates in favor of admitting evidence arguably otherwise inadmissible under established rules. In such cases deviations from the rules stated in this paragraph may be necessary. See generally *Davis v. Alaska.* 415 U.S. 308 (1978); *Chambers v. Mississippi,* 410 U.S. 284 (1973).

It is respectfully submitted, therefore, that Article 608 does not apply to a case such as this, where the Defendant intends to prove, not reputation or character, but a medical diagnosis of mental abnormality or sickness, or a prior inconsistent statement.

The Appellate Court's reliance on the physician-patient and psychologist-client privileges (LSA - R.S. 15:476 and LSA - R.S. 37:2362, respectfully) is also misplaced. These privileges are statutory creations and exceptions to the general rule that any witness must testify to all relevant facts he knows. Note: "Physician-patient Privilege." 27 La.L.Rev. 361. Accordingly, they are to be narrowly construed. i.e., in favor of admissibility of relevant evidence. Accordingly, although LSA - R.S. 15:476[1] clearly

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[1] In Louisiana, the physician-patient privilege has been set out in two statutes, one for criminal proceedings and one for civil proceedings. The two may not be confused or transposed. *Boulware v. Boulware,* 153 So. 2d 182 (La. App. 2nd Cir. 1963). The privilege with relation to criminal procedures is set out at LSA - R.S. 15:476. That statute provides as follows:

> § 476. Privileged communications between physician and patient; Exceptions
>
> A. Except as provided in Subsection B, no physician is permitted, whether during or after the termination of his employment as such, unless with his patient's express consent, to disclose any communication made to him as such physician by or on behalf of his patient, or the result of any investigation made into the patient's physicial or mental condition, or any opinion based upon such investigation, or any information that he may have gotten by

requires a patient's express consent to the dissemination of confidential information, this Honorable Court has ruled that a Defendant gives his implied consent to such dissemination when he makes his physical or mental health an issue in the case, resulting in the admissibility of evidence otherwise banned by the statute. *State v. Barry*, 324 So. 2d 822 (La. 1975). In addition, where the application of the statute would be unfair, or would not serve its purpose, this Court has ruled that the assertion of the

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(footnote 1 continued)

> reason of his being such physician. The provisions of this Section shall not apply to any physician, who, under the appointment of the court, and not by selection of the patient, has made investigation into the patient's physicial or mental condition; in addition, any physician may be cross-examined upon the correctness of any certificate issued by him.
>
> B. Nothing in this section shall preclude the admission of the results of any chemical test of the blood, breath, urine, semen, or other bodily substances of an arrested person, relevant to the possible culpability of the arrested person, nor shall this section render inadmissible any foreign objects, inlcuding bullets, which were inside the arrested person as a direct result of a criminal act of which he is accused.

The psychologist-client privilege is set out in LSA - R.S. 37:2362, which covers both civil and criminal proceedings. That section provides, in pertinent part:

> **§ 2363. Privileged Communications.**
>
> A. In judicial proceedings, whether civil, criminal, or juvenile, legislative and administrative proceedings, and proceedings preliminary and ancillary thereto, a patient or client, or his legal representative, may refuse to disclose or prevent the disclosure of confidential information, including information contained in administrative records, communicated to a psychologist licensed under this chapter, or persons reasonably believed by the patient or client to be so licensed, or to their employees or other persons under their supervision, for the purpose of diagnosis, evaluation, or treatment of nay mental or emotional condition or disorder.

privilege may be defeated. *State v. Acoin*, 362 S. 2d 503 (La. 1978).

In *Acoin*, the defendant pled not guilty by reason of insanity at her arraignment and thereafter sought the services of a psychiatrist. At trial, defendant chose not to call the psychiatrist but did not withdraw her plea. When the State thereafter called the doctor as a rebuttal witness, the doctor was allowed to testify over the defendant's objection. In upholding the decision to allow the doctor's testimony, this Court ruled that, although the defendant **expressly did not consent**, it would be unfair to allow her to assert the privilege in light of her plea:

> There is, however, a third set of circumstances described by the commentators as a "waiver": When the conduct of the person claiming the privilege, "(though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege." 8 Wigmore Section 2388(3).
>
> Description of such conduct as a "waiver" is perhaps inaccurate, since the claimant does not wish to abandon the privilege. Rather, the rule is an implied restriction on the use of the privilege, ot prevent its assertion in circumstances which do not advance its fundamental purposes: This restriction or non-application of the privilege is implied as intended by reason of its purposes when created by legislation or recognized by jurisprudence.
>
> As the commentators note, the physician-patient privilege is not an incompentency statute, excluding certain witnesses or evidence because

> of presumed untrustwothiness. Rather, it is a statutory privilege, excluding a certain class of information, which may well be highly reliable, in order to advance an intended social policy. **Accordingly, it may be appropriate for courts to inquire whether the information sought to be excluded is really in the class whose exclusion will advance the policy, and which was therefore intended to be excluded.** Since the "fairness" restriction implied from the purpose of rule has nothing to do with waiver, such an inquiry is not barred by the language of La. R.S. 15:476 to the effect that the patient's consent to disclosure by the physician must be express. *Acoin*, supra, pp. 505-506. (Emphasis added).

According to *Acoin*, then, this Court may not simply treat the privileges as a given. On the contrary, this Court must examine the circumstances to determine whether the assertion would "advance its fundamental purposes" and whether "the information sought to be excluded is really in the class whose exclusion will advance the policy."

In the usual case, the information sought concerns the defendant, and it is the defendant who asserts the privilege. It is respectfully submitted that the statutory privileges were intended for that very situation and no other. As of 1967, Louisiana had no physician-patient privilege in civil cases whatsoever, and was the only State to have a privilege only in criminal proceedings. Note: Physician-patient Privilege, 27 La.Law Rev. 361. It is respectfully submitted that the rationale behind the statute, therefore, is the Fifth Amendment right against self-incrimination, i.e., that a patient should be able to give a physician all information necessary for his treatment without fear of **incriminating himself.** In this case, the patient is not on trial; the patient has not been accused. On

the contrary, in this case, the patient is the accuser. Instead of operating as a safeguard of an accused's constitutional right, the privilege here is being asserted against the accused, arguably denying him his constitutional right to confront and cross-examine his accuser effectively. It is submitted that a prosecution witness, especially the chief prosecution witness, is just such a person in a "position, with respect to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege." In this case, as in *Acoin*, the information sought is not being sought in order to prove a case against the patient. On the contrary, the patient is attempting to prove a case against the defendant. It would be fundamentally unfair to allow the chief accuser to throw up the veil of privilege as a protection against cross-examination.

In addition, it must be kept in mind that, even in criminal cases, the privilege is personal to the patient or client and may not be asserted by any other party.[2] LSA - R.S. 15:478. In this case, there is no evidence in the record that the privilege was ever asserted by Mrs. Rhoda Alden, whose medical records were sought. Rather, the issue of privilege was raised only by the State, which has no standing to raise it.

Moreover, where the patient is not a party to the proceedings, it is highly questionable whether even the patient has standing to assert the privilege. In the case of *State v. Romero*, 533 So. 2d 1264 (La. App. 3rd Cir. 1988), a medicare and medicaid fraud case, the State was allowed to introduce into evidence patient files without any waiver of the physician-patient privilege by the patients whatsoever.

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[2] In the absence of evidence to the contrary, a psychologist is presumed by Statute to be authorized to claim the privilege on behalf of the patient or client. LSA - R.S. 37:2362(B).

The court ruled that the doctors had no standing to assert the privilege as the privilege is purely personal to the patient, and went on to state that "Since the patients are not parties in this case, no prejudice to the patients can arise." Again, as suggested by *Acoin*, it seems clear that the purpose of the statutory privileges is to protect a defendant, not witnesses or other non-litigants, and it is respectfully submitted that it was error to permit its assertion in the instant case.

Finally, it must be emphasized that, to the extent that the privilege is used to prevent the defendant from obtaining relevant evidence for his defense, the privilege is violative of the defendant's constitutional right to due process and fair trial. *Brady v. Maryland*, 373 U.S. 83, 87: 83 S. Ct. 1194, 1196-7; 10 L. Ed. 2d 215 (1963). As this Court has itself acknowledged in the case of *State v. Davis*, 562 So. 2d 1173 (La. App. 4th Cir. 1990), if the evidence sought is material to guilt or punishment, and its suppression would deprive the defendant of a fair trial, it may not be suppressed regardless of the statutory privilege. Under *Davis*, the trial court has the duty to inspect the record sought to determine if there is anything in them which would materially affect the outcome of the trial. That was not done in this case.

It should be noted that, since the trial of this matter, Mrs. Alden has admitted, under oath, that she was indeed under the care of a psychiatrist at the time of the offense and under the care of a psychologist at the time of trial. In the civil case of *Alden v. Baker*, No. 89-22957 on the docket of the Civil District Court for the Parish of Orleans, Mrs. Alden sought civil damages from Defendant, Gerald Bernard Baker, for the death of her son and the battery upon her. The Defendant, having already been criminally convicted for the offenses for which Mrs. Alden was suing, her

success in that suit was virtually assured. And Mr. Baker being a person with considerable assets, Mrs. Alden stood to recover a considerable sum. Nevertheless, when ordered by Judge Ganucheau to submit to a psychiatric examination and faced with a further motion to depose her psychiatrist and psychologist, Mrs. Alden abruptly dismissed her civil suit **with prejudice.** (See Order of 5/17/91, Motion of 5/15/91 and Motion and Order of 5/28/91 attached hereto as Exhibits U, V and W, respectfully). The only logical reason for doing so is that the information sought would diminish the chances of recovery to the point that disclosure would not be worth it. Considering that the records were so damaging to her civil suit, with its preponderance of the evidence standard, one can only imagine how damaging they would be to the State's criminal case where the burden of proof is "beyond a reasonable doubt." It is clear that the records sought contained *Brady* material.

Because the Trial Court prevented Defendant from reviewing the medical and psychological records of Mrs. Alden, Defendant was denied evidence "material to the Defendant's guilt or punishment" and was deprived of a fair trial in that he was deprived of an opportunity to impeach the only alleged eyewitness of his participation in the crime charge. *State v. Davis,* supra at 1176, citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963). Accordingly, this case should be remanded for a new trial.

ASSIGNMENT OF ERROR NO. II

The police investigative file contained evidence which not only contradicted the testimony of the State's chief witness, but bolstered the testimony of the Defendant. As

such, said evidence was exculpatory and its suppression requires that the verdict be reversed and this matter remanded for a new trial.

Among the numerous pre-trial motions filed, the defense included a Motion for Discovery and Oyer and an Application for Bill of Particulars. Pursuant to these motions, the defense was provided with the so-called "incident" police report. The Trial Court denied a defense request for the full investigatory report including all information obtained in the initial investigation. (See Transcript of Motion Hearing dated 1/4/89). Later, the defense requested an in-camera inspection by the Trial Court to determine whether the full police report contained *Brady* material. The Court complied, but ruled the report contained no *Brady* material. (See Minute Entry of 1/20/89, attached hereto as Exhibit I). In both rulings, the Trial Court erred.

It is clear that an initial police report is subject to discovery. *State v. Shropshire,* 471 So. 2d 707 (1985). The reporting officer may not defeat the intent of La. R.S. 44:3A(4) by selectively including information in the initial report and placing the rest in a subsequent report. *State v. McEwen,* 504 So. 2d 817 (1987). The initial report should include all information obtained in the initial investigation of the complaint. *State v. McEwen,* supra; *State v. Hall,* 549 So. 2d 373 (La. App. 2nd Cir. 1989).

In the present case, the State provided the defense with a 5-page narrative report written by Detective Adams and termed the "incident report." (pp. 9, 32 - 33). Yet during the trial, evidence was presented indicating several officers responded to the initial call and conducted an initial investigation of the complaint which led to the defendant's arrest. Indeed, Detective Adams was not among the first arrivals on the scene. Detective Adams' testimony as to

when he arrived and the computer printout sheet of the radio broadcast place him on the scene anywhere from one to two-and-a-half hours after the defendant was in custody. Thus, the defense was entitled to the reports written by these officers which were contained in the full report. The Trial Court erred in not providing the defense with the full police report as requested in discovery.

Left with the Court's ruling, the defense made a motion for *Brady* material and specifically requested the Court to conduct an in-camera inspection of the full police report to determine whether it contained such material. (See Minute Entries dated 3/7/89 and 3/8/89, attached hereto as Exhibits J and K, respectfully). Following this in-camera inspection, the Trial Court ruled the police report did not contain *Brady* material and again refused to turn it over to the defense. In so ruling, the Trial Court erred.

The due process clause of the 14th Amendment of the U.S. Constitution requires the disclosure, upon request, of evidence which is favorable to the accused, where the evidence is material to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). Ultimately, the question is whether the failure to disclose the evidence is of sufficient significance so as to result in the denial of a defendant's right to a fair trial. *U.S. v. Agurs*, 427 U.S. 97 (1976). The test of whether the undisclosed evidence is of sufficient significance depends on the type of request for exculpatory evidence made. Where, as in the present case, a defendant makes only a general request for "all *Brady* material," the standard of materiality is whether the undisclosed evidence creates a reasonable doubt that did not otherwise exist. *U.S. v. Agurs*, supra; *State v. Johnson*, 464 So. 2d 1363 (1985).

Had the defendant been provided all of the reports in the possession of the District Attorney's Office and the New Orleans Police Department in addition to the two hairs found in the hand of the victim, the defendant would have learned earlier in the case that there was a hair found in the hat belonging to the defendant. In the tape recording of the radio police broadcast of this incident, Officer Silbernagel observed someone putting the hat on while he had the back of the house under surveillance. Had this hair been analyzed and determined not to be that of the defendent, it would have supported the defendant's case and showed that someone other than the defendant wore the hat. By the time the defense was provided with this report, and a request was made for examination, the State demanded their right to send the hair which had been described as "a light-colored hair" to the FBI. (See transcript of Hearing of July 14, 1989). The FBI report indicates, when they received the evidence envelope, there was no hair contained therein. A further examination by the defense expert, Mr. Richard Bisbing indicated that there was no hair contained inside the envelope that had been forwarded to him from the FBI.

Further, in connection with the civil case filed by Mrs. Alden, undersigned counsel did eventually receive the entire police file in this matter. The review of said file makes it clear that it did contain *Brady* material. Foremost among the *Brady* material was a transcript of a statement given by Rhoda Alden, the State's chief witness — and the only person other than Defendant and the victim identified as having witnessed the events occurring inside the house — which not only contradicts her trial testimony, but actually supports Defendant's version of the events. (See Exhibit V, attached hereto). Among these contradictions are the following:

1) At trial, Mrs. Alden insisted that although blind in one eye, she had no trouble seeing with the other. (Trial Transcript, pp. 397, 398). In her statement, however, she states: "Yes, he knew that I was blind, and that he knew I was having trouble with my other eye."

2) At trial, Mrs. Alden stated that she was absolutely sure that Defendant was the one who shot her and vehemently denied that she ever told anyone that the face she saw was "distorted." (Trial Transcript, pp. 486, 487). Yet, that is exactly what she tells the police in her statement: "So I turned and I looked at Ben and his face was like, totally distorted. I mean like he, he looked like a madman, — or a maniac or something." This account, which was withheld from defense counsel, is nearly identical to the account of the defense witnesses, James and Maria Parrie. According to the Parries, Mrs. Alden told them, while they were visiting her in the hospital on the day of the incident, that she "didn't think it was Ben, but it had to be him because he was the only other person in the house." (Trial Transcript, p. 886). When telling them what she actually saw, she specifically stated that she turned and saw a blurred or distorted face with white flowing hair. (Trial Transcript, pp. 870, 889). It seems obvious to the undersigned that either Mrs. Alden deliberty lied on the stand in order to bolster her own testimony (that of the only eye witness) or that she has trouble recognizing the truth. (Here again, her medical records would be relevant).

3) At trial, Mrs. Alden testified that she reset the burglar alarms after she let the Defendant into the house (Trial Transcript, p. 403) and that she had to turn it off in order to sneak out after being shot. (Trial Transcript p. 436). In her statement however, she states: "I said to him, 'Wait I have to turn off the alarms.' My house has a burglar alarms, he waited until I was attired and I let him

in and he was in a very good mood." Nowhere in her statement does she mention turning the main alarms back on. On the contrary, rather than having to stop to turn the alarm off before sneaking out, in her statement she states that only the front door alarm was on, no others:

> The front, I not only bolted the screen, I also double locked the door and checked to see that the alarm was on. At that, at that particular place. The alarm to the house was not on, but I could have pushed the button in the kitchen before, as I was running.

Moreover, not only was the main alarm not on, but, contrary to her testimony at trial (Trial Transcript p. 437), the kitchen door and screen dor through which she escaped were not even locked:

> And although yesterday I said the door was locked leading out of the side of the house, it wasn't. It was open and the reason I know it was open was I said to myself, "oh my God, the key isn't in the door. It must, I hope it's still hanging on the nail because if it's not, then how am I going to get out." But the door was open, both doors, the screen door and the door to the side of the house.

4) At trial, Mrs. Alden testified that she specifically remembered commenting to herself that the Defendant "hasn't started to carry those books anywhere. They are still there. Like you know, you didn't even open the door." (Trial Transcript p. 429). In her statement to the police, she states,

> I believe he brought the first set or the first box of books out to his car. And to get out of my house is very difficult because that front door

> sticks. You really have to have the knack to, to know how to pull it open. So I, I don't know ... if he did or didn't do it but ... I didn't remember seeing that, that first box of books. I believe he did take them out to the car when I went back to check on the other books, and ... we finished picking out what we wanted and he was getting ready to leave...

Whether or not the Defendant actually took a box of books out to his car, it is clear from her statement to the police, that he could have taken it out the front door without her knowing about it.

The importance of these discrepancies cannot be overemphasized. It must be kept in mind that other than Mrs. Alden's identification of the Defendant as the perpetrator, the State's entire case revolved around the argument that it had to be Defendant because he was the only other person in the house and the burglar alarms were on. The witness's statement that was withheld from the defense does not support that theory. Not only does it show that Mrs. Alden's identification of the Defendant is suspect as a result of her blurred vision, but it shows that not only were the alarms not on everywhere in the house, but that the side door was unlocked and that she wasn't even sure whether Defendant had gone in or out of the front door. Had defense counsel been provided with the statement, counsel could have impeached the witness, and argued to the jury that either the State's chief witness was lying about the alarms in order to convince the jury that the Defendant must have been the perpetrator, or that she was mentally unstable and had actually convinced herself of the absolute truth of her own deduction.

Given this context, the Trial Court erred in ruling the police report did not contain evidence favorable to the

defense. The undisclosed evidence was clearly material in that it creates a reasonable doubt that did not otherwise exist by corroborating the defendant's account of the facts. By denying the defense access to this evidence, the Trial Court deprived the defendant of his right to a fair trial, and reversibly erred.

ASSIGNMENT OF ERROR NO. III

The contemporaneous objection rule should not be employed to deny the Defendant the right to complain of a jury charge [the "Cage" charge] which has been determined to be violative of fundamental due process.

The Defendant was tried and convicted of First Degree Murder in August, 1989. At trial, the Court instructed the jury as to the reasonable doubt standard using the now famous "*Cage*" charge on the definition of "reasonable doubt".[3] In November of 1990, while this case

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[3] At the time that this Defendant was tried, all but one of the Judges of the Criminal District Court in and for the Parish of Orleans were using the following explanation of "reasonable doubt":

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is you duty to gve him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded unon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

was still pending on direct review by the Court of Appeal (but after all briefs had been filed), the U.S. Supreme Court in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), ruled that the charge in question violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it would allow a reasonable juror to have "interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." 111 S. Ct. at 330.

Accordingly, undersigned counsel raised the issue of the illicit jury instruction at oral arguments before the Court of Appeal and in his Application for Rehearing which was denied. The Court of appeal, in its opinion of May 30, 1991, dismissed the issue out of hand on the basis of the contemporaneous objection rule. Because of the Constitutional proportions of the error, however, it is respectfully submitted that the contemporaneous objection rule does not apply.

To begin with, it is clear that the rule of *Cage*, as a new rule for the conduct of criminal prosecutions, applies retroactively to all cases, state or federal, pending on direct review, and therefore not yet final, with no exceptions. *Griffith v. Kentucky*, 479 U.S. 313 (1987). Had an objection to the charge been made at trial, there is no question but that this Court would be obliged to apply the rule of *Cage* to this case and count the charge as error. The question, then, is simply whether the defendant may obtain the relief sought in the face of a state law's procedural bar. To this

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Footnote 3 continued.

The transcript in this matter does not contain the Judge's charge to the jury, nor did the defense counsel specifically object to the language used by the Trial Court in explaining the phrase, "beyond a reasonable doubt." However, undersigned counsel represents that the charge given was substantially identical to the "*Cage*" charge.

question, the answer must be yes.

Were this Court to apply the bar, and the U.S. Supreme Court not grant certiorari, this matter would ultimately end up before the U.S. District Court on a Petition for Habeas Corpus. When that occurs, the U.S. District Court will be obliged, under *Reed v. Ross*, 468 U.S. 1 (1984), to apply the rule of *Cage*, despite the procedural bar of the contemporaneous objection rule.

Reed v. Ross, like *Cage*, dealt with the issue of a jury instruction as to the burden of proof in a criminal case. Both *Reed* and *Cage* relied upon the case of *In Re: Winship*, 397 U.S. 358 (1970), wherein the U.S. Supreme Court ruled that "the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re: Winship*, 397 U.S. at 364. In *Reed*, the defendant attempted to have applied to his case, through post-conviction proceedings, the rule of *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which struck down as violative of due process a requirement that a defendant in a first degree murder case bear the burden of proving lack of malice. The North Carolina Courts, however, ruled that, because the defendant did not contest the jury instruction on appeal, he was barred from raising it in post-conviction proceedings. The United States District Court, upon reviewing defendant's subsequent Federal Petition for Habeas Corpus agreed with the North Carolina Courts.

The U.S. Supreme Court, however, on reviewing the Federal Petition, ruled that the State law procedural default could not be applied where the defendant could show "cause and prejudice," i.e., where there is cause for the defendant's failure to raise the issue timely, and resulting prejudice. The Court went on to state that the

novelty of a claim is sufficient cause for failing to raise it:

> In general, therefore, defense counsel may not make a tactical decision to forego a procedural opportunity — for instance, an opportunity to object at trial or to raise an issue on appeal — and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court.
>
> * * *
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest. And the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met.
>
> * * *
>
> Counsel's failure to raise a claim for which there was no reasonable basis in existing law does not seriously implicate any of the concerns that might otherwise require deference to a state's procedural bar.
>
> * * *
>
> In addition, if we were to hold that the novelty of a constitutional question does not give rise to cause for counsel's failure to raise it, we might actually disrupt state-court proceedings by encouraging defense counsel to include any and all remotely plausible constitutional claims that could, someday, gain recognition.

* * *

> Accordingly, we hold that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.

Reed v. Ross, 468 U.S. at 14-16.

This Court has also acknowledged that a State procedural bar will not apply in a habeas corpus proceeding for constitutional errors which violate fundamental requirements of due process, where there is cause for the procedural omission. *State v. Williamson,* 389 So. 2d 1328 (La. 1980). See also *State v. Holland,* 544 So. 2d 461 (La. App. 2d Cir. 1989). In *Williamson,* the defendant assigned as error on appeal a jury instruction which misstated the law as to the definitions of first and second degree murder. The state objected to the court reviewing the charge as the defendant did not object to the charge at trial. However, this Court noted that the issue could be raised by a Petition for Writ of Habeas Corpus, and ruled that, where the record bears full and sufficient proof for the error, it is preferable to address the error on direct review, than to wait until a habeas corpus proceeding, despite the lack of a contemporaneous objection:

> The state points out that defendant did not object to the erroneous jury instruction concerning definitions of the crimes of first degree and second degree murder. And they call our attention to a long line of cases to the effect that erroneous jury instructions are not errors patent on the face of the record. Absent objections and because the trial court is denied an opportunity to correct them, such errors are generally not reviewable.

> The state's argument is of course correct, so far as it goes. Nonetheless it is within the province of this reviewing court to entertain complaint of Constitutional violations on appellate review notwithstanding that consideration of such complaint more often than not is deferred until filing of a writ of habeas corpus. This court's usual pretermission of such issues stems from the need of an evidentiary hearing which can only be had incident to the writ of habeas corpus. The record before us, however, bears full and sufficient proof of the error which no posterior hearing could augment. For this reason, the need for delay is obviated.
>
> In the case at hand, the asserted error involves the very definition of the crime of which defend - ant was in fact convicted. Such an error is of such importance and significance as to violate fundamental requirements of due process.
>
> Furthermore to defer consideration until defendant were to file a writ of habeas corpus would only serve to prolong the occasion when defendant might again be tried, with, resultant prejudice to the state's opportunity to reassemble its witnesses and evidence. For these reasons we find it preferable now to reverse defendant's conviction and sentence and order him retried.

State v. Williamson,. supra, at 1331.

Similarly, in *State v. Green*, 493 So. 2d 588 (La. 1986), the defendant assigned as error the failure of the trial judge to give the jury an instruction limiting the use of prior crimes evidence to the sentencing phase of the trial and not to the question of the defendant's guilt. The Court of Appeals refused to consider the question on the basis of

the contemporaneous objection rule. This Court, however, disagreed, because of the Constitutional due process implications of the error:

> Defendant's assignment of error in the Court of Appeal and in this Court, however, involves much more than a simple failure to give a jury instruction rquired by state law. He contends that La. R.S. 14:67 violates the due process clause of the Fourteenth Amendment because it authorizes the use of his past convictions as evidence of present guilt without the rquirement of a limiting jury instruction that the prior convictions are relevant only to the question of enhanced punishment. The Court of Appeal may have disregarded defendant's Constitutional argument as not having been properly raised below. But, if this is the case, a Court of Appeal Brethren fell into error. The facial and Constitutionality of a statute on which a conviction is based is an error discoverable by the mere inspection of pleadings and proceedings, without inspection of the evidence, which an appellate court is entitled to review, even though the defendant did not comply with the assignment of error procedure.

State v. Green, supra, at 590.

This Court went on to rule that the statute was *not* unconstitutional on its face. Nevertheless, this Court went on to overturn the verdict, despite the contemporaneous objection rule because:

> Defendant's conviction and sentence were obtained through a procedure which falls below the minimum level that the due process clause will tolerate and therefore must be set aside. The jury which was to decide defendant's guilt or in-

> nocence on the primary charge was informed of the allegations of defendant's two prior convictions in the indictment and given evidence of these convictions during the guilt-determination phase trial. The jury was not instructed to refrain from taking this information into account in deciding defendant's guilt or innocence. This presented a substantial and constitutionally intolerable potential for prejudice. Accordingly, the defendant's conviction and sentence are reversed and the case is remanded to the trial court for further proceedings.

State v. Green, supra, at p. 592.

It is respectfully submitted that the jury instruction in the present case is "an error of such importance and significance as to violate fundamental requirements of due process to the defendant's prejudice." It is clear that the U.S. Supreme Court thought as much. In striking down the charge, the United States Supreme Court began its discussion by noting the basic, fundamental role of the reasonable doubt standard to a fair trial:

> In state criminal trials, the due process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); see also *Jackson v. Virginia*, 443 U.S. 307, 315-316, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). This reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 357 U.S. at 363, 90 S. Ct. at 1072. Among other things, "[i]t is a prime instrument for reducing the risk of convictions resting on factual

> error." *Ibid.* The issue before us is whether the reasonable doubt instruction in this case complied with *Winship.*

As can be seen from the above quote, it is absolutely clear that the United States Supreme Court felt that the "*Cage*" charge was an error "of such importance and significance as to violate fundamental requirements of due process." *State v. Williamson,* supra, at 1331. Accordingly, it is clear that the jury instruction at issue falls within the *Williamson/Green* exception to the contemporaneous objection rule.[4]

Finally, undersigned counsel realizes that it is his burden under both *Reed v. Ross,* and the corresponding Louisiana jurisprudence, *State v. Holland,* to convince this Court that his failure to object to the charge was excusable and not the result of trial strategy. It is submitted, however, that under both *Reed* and *Holland,* undersigned counsel's failure to object was not only excusable, based on the novelty of the issue, but preferable. As the Court stated in *Reed:*

> "If novelty were never cause, counsel on appeal would be obliged to raise and argue every con-

---

[4] Undersigned counsel is aware of the recent decision of the Fourth Circuit Court of Appeal in the case of *State v. Dobson,* No. 90-KA-2112, wherein that Court applied the contemporaneous objection rule to preclude the review of a "*Cage*" charge. However, that Court directed its attention to the "plain error" doctrine, which undersigned counsel feels missed the point. *Williamson* did not apply the "plain error" doctrine at all. Rather, despite agreeing that the "plain error" doctrine does not apply to jury instructions, this Court acknowledged in *Williamson* that the error was so fundamental that it was going to have to be addressed at some point or another and that it might as well be addressed upon direct review. Under *Williamson* and *Cage,* it is clear that the *Cage* charge is an error so fundamental as to be an exception to the contemporaneous objection rule.

> ceivable constitutional claim, no matter how far fetched, in order to preserve a right for post conviction relief upon some future, unforeseen development in the law. Appellate Courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable." 704 F. 2d, at 708.
>
> *Reed v. Ross,* 468 U.S. at 16, quoting the Court of Appeals in the same case.

As this Court is aware, in August of 1989 the above charge had been upheld by this Court numerous times. In fact, in December of 1989, (after the trial of this matter), this Court again, in *State v. Cage,* 554 So. 2d 39 (La. 1989), approved this charge in a capital murder case. It was not until November of 1990 that the decision of the United States Supreme Court in that matter was handed down and the matter remanded to this Court. Therefore, undersigned counsel, at the time of trial, was aware that the issue of the correctness of the standard jury charge given in Criminal District Court for the Parish of Orleans had been settled by this Court, and any objection thereto would have been frivolous. Therefore, under both *Reed* and *Holland*, undersigned counsel clearly had "cause" not to object at trial.

ASSIGNMENT OF ERROR NO. IV .

The prosecution's use of double hearsay to prove a prior consistent statement of the State's chief witness was error and prejudicial to the Defendant.

During the defendant's case, the defense called Dr.

Yonovitz as an expert in speech and hearing science. This witness prepared copies and transcripts of several tapes provided to the defense by the State. One such tape was a police broadcast. (Trial Transcript, p. 809). The defense sought to play a portion of this tape to corroborate the portion of the testimony of Officer Silbernagel where he admitted he broadcast over his radio that he saw two different people in the Alden residence. (Trial Transcript, p. 317 - 321). Problems arose, however, when the defense realized that this portion contained an unrelated inadmissible hearsay statement. The defense sought to exclude this hearsay statement from being played to the jury. The Trial Court elected to play the whole portion, including the hearsay statement. In so doing, the Trial Court erred. (Trial Transcript, p. 818 - 823).

Evidence of an out-of-court statement offered to prove the truth of the statement is hearsay and inadmissible. La. C. E. Art. 802; *State v. Joseph*, 425 So. 2d 1261 (1983). In the present case, as stated, the defense sought to exclude a statement from a tape it wished to play to the jury. This statement was "all right, the nurse tells me that the perpetrator is Ben Baker." (Trial Transcript, p. 821). Thus, not only was the contested statement hearsay, but it also implicated the defendant in the crime. Given this context, the Trial Court erred in not excluding it from the jury.

Not only was the above quoted statement hearsay, it was double hearsay. It was the nurse telling the police officer the perpetrator was Ben Baker. It is very unlikely that either Mrs. Alden or the nurse used the word "perpetrator." Rather, the police officer, in relaying that information, used the word "perpetrator." It is more likely that the nurse asked Mrs. Alden who she was with or who was in the house, to which she responded, Ben Baker. The nurse then relayed that information to the police officer

and in his mind, Ben Baker immediately became the perpetrator and after his broadcast, in everybody's mind, Ben Baker had been identified as the perpetrator captured, case closed. That was the mentality of the police on the scene after this broadcast. This allowance by the Court of double hearsay after objection by the defense was so inflammable as to deny the defendant, Ben Baker, a fair trial and was in fact error on the Court's part.

In its opinion of May 30, 1991, the Fourth Circuit ruled that although the use of the tape was hearsay and erroneous, it was harmless error, as the declarant, Mrs. Rhoda Alden, was in Court to testify. However, the Court of Appeal was confused as to who the declarant was. There was no question that Mrs. Alden, by the time of trial, had identified the Defendant as the perpetrator. The question was whether her contentions at trial were consistent with her statements at the time of the event. The out of Court statement being offered for the truth of its contents, in this case, was the statement made by the nurse, who was not at trial to testify.

Given the conflicting testimony of the Parries, who testified that Mrs. Alden, on the day of the event, was not sure that the Defendant was guilty, and that of Mrs. Alden and Judith Held at trial, who testified that Mrs. Alden did positively identify the Defendant as the perpetrator on the day of the murder, the use of a tape wherein a police officer identifies the Defendant as the perpetrator because another person has "identified" the Defendant was highly prejudicial and requires reversal.

ASSIGNMENT OF ERROR NO. V

The Court of Appeal erred in upholding the Trial Court's decision not to allow the defense to call a juror to testify at the Hearing of Defendant's Motion for a New Trial.

Following the defendant's conviction, the defense filed a Motion for New Trial raising several issues discussed in the above assignment of errors. Moreover, in ground seven, the defense asked for a new trial based upon a violation of the jury's sequestration order in that certain individuals made improper contact with the jury with the purpose of improperly influencing the jury in their deliberations. Regarding this ground, the defense specifically requested a hearing wherein the defense would be allowed to call jury members as witnesses. The defense filed a written memorandum setting forth the factual basis for the motion and also the pertinent law. Attached to the memorandum were sworn statements of two witnesses who saw physical and verbal contact between three unknown individuals and members of the jury which took place at the jury's hotel.

The Trial Court conducted a formal hearing on this Motion on November 30, 1989. During this Hearing, the defense presented witnesses who stated they saw contact between three individuals and the jury while the jury was at their sequestration hotel. One of these three subjects, Kent Browning, also testified. This subject stated he arrived at the hotel after work and had been there about 3½ hours when he saw the jury. He denied, however, approaching, touching, or talking to any jurors. (Transcript of Hearing of 11/30/89, p. 10 -13). He also denied that any of his companions made any verbal gestures or movements to the jury. (Transcript of Hearing, p. 10 - 12). He also denied being told not to talk to the jury. He admitted to not working for the Sheriff's Office. (Transcript of Hearing. p. 12).

In contrast to this testimony, the defense presented several witnesses who stated they saw Browning approach the jury with two companions, place his arm around one juror, and speak to this juror. When confronted, Browning held himself out to be a special agent working on the case.

(Transcript of Hearing, pp. 4, 24). Later, after all left the hotel, a female companion of Browning returned and demanded to know from hotel employees what they had heard her say to the jury. (Transcript of Hearing, p. 7). The defense also presented two Sheriff's Deputies assigned to the jury who confronted the three subjects after the incident with the jury. Browning admitted to one Deputy that he spoke to the jurors and that he placed his arm around one. When asked what he told the jury, Browning repeatedly stated that he was a plainclothes security deputy for the Sheriff's Office. (Transcript of Hearing, pp. 16, 17).

Following the Hearing, the Trial Court denied the Motion for New Trial. Prior to the Hearing, the Trial Court refused to allow the defense to subpoena or present jury members to testify as to the above incident. (See Motion for a Hearing and Minute Entry dated 10/16/89, attached hereto as Exhibits M and N, respectively). The Trial Court erred in not allowing the defense to present jury members as witnesses on the Motion and in not granting the Motion for New Trial.

The Louisiana Supreme Court has held that in a criminal case, any private communication, contact, or tampering directly or indirectly with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties. *State v. Wisham*, 371 So. 2d 1151 (1979). Such a contact or communication would violate the defendant's constitutional due process right to a fair trial. *State v. Marchand*, 362 So. 2d 1090 (1978). Accordingly, evidence of the alleged prejudicial conduct mentioned in the motion was relevant and material to the defendant's

motion and its exclusion by the Trial Court was clearly erroneous. Thus, the Trial Court erred in not allowing the defense to present evidence of this type misconduct prohibited in *State v. Wisham*, supra.

Further, Louisiana decisions have consistently held that jurors are competent to establish an overt act independent of the jury deliberations, if this overt act is in violation of law or of the statutory formalities designed to assure the impartiality from influences extraneous of the evidence presented to it for its consideration. *State v. Wisham*, supra at 1154 and cases cited therein. Thus the Trial Court also erred in disallowing the defense to call jury members in support of the Motion for New Trial, particularly in light of the contradictions made in Browning's testimony.

In its opinion of May 30, 1991, the Court of Appeal quoted Louisiana Code of Evidence, Art. 606(B), emphasizing that portion that states:

> ... except that a juror may testify on the question of whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention.

The Court of Appeal went on to state that since no evidence was presented that the case was discussed or that the juror was influenced against the defendant "no showing to this effect was made."

Undersigned counsel is at a loss to understand the meaning of the Court of Appeal's decision. Either the Court of Appeal's overlooked the fact that defense counsel was prohibited from examining jurors on the question of

whether any outside influence was improperly brought to bear upon them, or the Court of Appeals is requiring that defense counsel establish that fact before a juror can testify. If that is the meaning of the Court of Appeal's opinion, it makes the provision in the Article useless to the Defendant. If defense counsel has already established the fact of improper influence, there is no need for the testimony of the juror. Yet the juror is the best person to ask.

From the above, the defense submits the Trial Court erred in denying the new trial based on the memorandum, attached affidavits and testimony presented at the Hearing. In the alternative, the defense contends the Trial Court erred in preventing the defense from presenting jurors as witnesses at the hearing in support of the Motion. Thus, this Honorable Court should at least remand for a full hearing on ground seven of the Motion for New Trial so that the defense can present jury members to establish what was said to them.

CONCLUSION

Although any one of the errors assigned would be sufficient to cast doubt upon the jury's verdict in this matter, the cumulative effect of all five errors absolutely mandates reversal.

Had defense counsel been permitted to confront the State's chief witness with her medical condition, the jury may well have chosen to believe that her story at trial was merely a product of her personal need to explain to herself the events of November 2, 1988.

Had defense counsel been provided with Mrs. Alden's statement of November 3, 1988, the jury may have

been more inclined to believe Defendant's story that someone else entered the house and assaulted him as well as Mrs. Alden and her son.

Had the jury been correctly instructed as to the definition of "reasonable doubt, " the jury may well have found that the evidence actually presented (not to mention the evidence which was erroneously excluded) did not meet the standard of "reasonable doubt."

Had the jury not heard the police tape, which "identified" the Defendant as the "perpetrator," the jury might have believed the testimony of the Parries with respect to Mrs. Alden's contemporaneous perception of the events, rather than Mrs. Alden's well-rehearsed relation of those events at trial.

Had the trial Court permitted defense counsel to subpoena jury members to testify at the Hearing on the Motion for New Trial, counsel may have convinced the Trial Court that jury members were improperly influenced.

Taken together, these errors cry out for reversal in this case. As the Defendant has been sentenced to life imprisonment without benefit of suspension, probation or parole, this Honorable Court should take great care to insure that the jury's verdict is beyond suspicion. Because of the multiple errors committed at the Trial Court level, it is respectfully submitted that no such assurance can be found. Accordingly, the verdict in this matter should be

reversed and this matter remanded for a new trial with all of the evidence.

Respectfully submitted:

/s/ Leroy A. Hartley
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APPENDIX G

CASE NO. A 728

UNITED STATES SUPREME COURT

OCTOBER, 1991 TERM

RECEIVED
MAR 30 1992

STATE OF LOUISIANA

VERSUS

GERALD BERNARD BAKER

APPLICATION TO ANTONIN SCALIA FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT, CASE NO. 91-K-2201 APPLICATION FOR GERALD BERNARD BAKER

SUBMITTED BY:

LEROY A. HARTLEY, Bar No. 6631
Counsel of Record for
Defendant Gerald Bernard Baker
507 Frenchmen Street
New Orleans, LA 70116
(504) 943-8046

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STATEMENT OF GROUNDS FOR JURISDICTION

This Honorable Court has jurisdiction to review the opinion of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, rendered on May 30, 1991, by Writ of Certiorari under Supreme Court Rule 10.1(c), because the State Court of Appeals decided a question of Federal law in a way that conflicts with a decision of this Honorable Court. The Louisiana Court of Appeal affirmed the verdict and sentence in this case, refusing to review the jury charge as to "reasonable doubt" given in this case even though the same jury charge was held by the United States Supreme Court in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990), to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because a reasonable juror could interpret the instruction as allowing a finding of guilt based upon a lower degree of proof than that required by the Due Process Clause.

The United States Supreme Court ruled in *Cage* in November of 1990, while the present case was still pending on direct review by the Louisiana Court of Appeal for the Fourth Circuit, but after all briefs had been filed. Accordingly, undersigned counsel raised the issue of the unconstitutional jury instructioin at oral argument before the Court of Appeal, and in his Application for Rehearing, which was denied. The Court of Appeal, in its opinion of May 30, 1991, dismissed the issue out of hand on the basis of the Contemporaneous Objection Rule. Undersigned counsel also raised the issue of the unconstitutional jury instruction in an Application for Writ for Certiorari or Review to the Louisiana Supreme Court. The Application for a Writ of Certiorari was denied on January 10, 1992 without written reasons.

JUDGMENT SOUGHT TO BE REVIEWED

The appplicant herein seeks an Extension of Time Within Which to File a Petition for a Writ of Certiorari to review the decision of the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558. In its opinion, the Court of Appeal affirmed the verdict finding the Defendant guilty of First Degree Murder and the Trial Court's November 30, 1989 sentence of life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. An Application for Rehearing filed in the Louisiana Court of Appeal for the Fourth Circuit was denied on August 27, 1991, without written reasons. The Supreme Court of Louisiana, No. 91-K-2201 denied the Defendant's Application for a Writ of Certiorari and/or Review to the Louisiana Court of Appeal for the Fourth Circuit, No. 90-KA-0558, on January 10, 1992.

ARGUMENT

Under Supreme Court Rule 13.1, a Petition for a Writ of Certiorari seeking review of a Judgment of a lower State Court which is subject to discretionary review by the State Court of last resort shall be deemed in time when it is filed with the Clerk within ninety (90) days after the entry of the order denying discretionary review. The Louisiana Supreme Court denied review of the Judgment of the Louisiana Court of Appeal for the Fourth Circuit on January 10, 1992. Therefore, a Petition for a Writ of Certiorari seeking review of the Louisiana Court of Appeal's Judgment should be filed with this Honorable Court by April 9, 1992.

However, counsel for the applicant requests an extension of time within which to file because, although on January 20, 1992, counsel for applicant requested a transcription of the closing arguments, verdict and sentencing verdict, and the Court's charges to the jury from the trial, Case No. 330-597, held on August 25, 1989, the Court Reporter did not complete the transcript until March 25, 1992. The federal question of which the applicant will seek review on a Petition for Writ of Certiorari is based on a portion of this transcript containing the jury charges. The applicant is invoking the jurisdiction of this Honorable Court under Supreme Court Rule 10.1(c) on the basis that the Louisiana State Court's affirmation of the jury charge as to "reasonable doubt" given in this case conflicts with the decision of the United States Supreme Court in *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328 (1990), which held that the same jury charge given in this case violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See Transcript of August 25, 1989, Case No. 330-597, pp. 152-153). Counsel for the applicant was not able to prepare his argument in support of a Petition for a Writ of Certiorari in this case without a copy

of the transcript. Therefore, counsel requests this Honorable Court to extend the time to file a Petition for a Writ of Certiorari for a period of sixty (60) days as permitted under Supreme Court Rule 13.2.

WHEREFORE, undersigned counsel prays that this Honorable Court issue an Order granting applicant, Gerald Bernard Baker, an additional sixty (60) days within which to file a Petition for Writ of Certiorari with this Court.

Respectfully submitted:

/s/ Leroy A. Hartley
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ORDER

Considering the above and foregoing:

IT IS HEREBY ORDERED that applicant, Gerald Bernard Baker be granted an additional sixty (60) days within which to file a Petition for Writ of Certiorari with this Court.

Washington, D.C., this ____ day of _____, 1992.

_____

JUSTICE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been hand-delivered to the Assistant District Attorney for Section "H" of Criminal District Court for the Parish of Orleans, 2700 Tulane Avenue, New Orleans, Louisiana 70119, Phone: 827-3565, Counsel for the State of Louisiana, this 27th day of March, 1992 in compliance with Supreme Court Rule 29.3.

All parties required to be served have been served.

/s/ Leroy A. Hartley

LEROY A. HARTLEY

APPENDIX H

STATE OF LOUISIANA — CRIMINAL DISTRICT COURT

VS — PARISH OF ORLEANS

GERALD B. BAKER — CASE NO. 330-597, "H"

OPENING CLOSING ARGUMENTS, CLOSING ARGUMENTS, REBUTTAL ARGUMENTS AND THE COURT'S CHARGE TO THE JURY IN THE TRIAL ON THE MERITS AND THE BIFURCATED HEARING IN THE MATTER OF THE ABOVE-NAMED AND NUMBERED MATTER HELD IN OPEN COURT ON FRIDAY, AUGUST 25, 1989, BEFORE THE HONORABLE JAMES F. MC KAY, III, JUDGE PRESIDING

SECTION "H"

APPEARANCES: Leroy A. Hartley, Esq

LEROY A. HARTLEY, ESQ. — CO-COUNSEL FOR THE DEFENDANT

ROBERT FLEMING, ESQ. — CO-COUNSEL FOR THE DEFENDANT

JIM WILLIAMS, ESQ. — ASSISTANT DISTRICT ATTORNEY FOR THE STATE OF LOUISIANA

LAURIE WHITE — ASSISTANT DISTRICT ATTORNEY FOR THE STATE OF LOUISIANA

Reported by: Miriam B. Geerken
Certified Shorthand Reporter

COURT'S CHARGE TO THE JURY

BY THE COURT:

Ladies and gentlemen, a person accused of a crime is presumed by our law to be innocent until each element of the crime necessary to constitute his guilt is proven beyond a reasonable doubt. It is the duty of the jury if not convinced of the guilt of the defend-

ant beyond a reasonable doubt to find him not guilty. The defendant is not required to prove his innocence, but may rest upon the presumption of innocence until it is overthrown by positive, affirmative proof presented by the State. The burden, therefore, is upon the State to establish to your satisfaction and beyond a reasonable doubt the guilt of the defendant as to the crime charged. If you entertain a reasonable doubt as to any fact or element necessary to constitute the guilt of the defendant, it is your sworn duty to give him the benefit of that doubt and return the verdict of not guilty. This doubt must be a reasonable one, however. That is, one founded upon a real, tangible and substantial basis and not upon a mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a grave uncertainty raised in your mind by reason of the unsatisfactory character of the evidence. Likewise, if the State has proved the guilt of the defendant to your satisfaction, and beyond a reasonable doubt, you should return a verdict of guilty.

The Bill of Indictment is a mere accusation against the defendant and is not evidence of guilt, and the fact that the Bill of Indictment has been filed against the defendant has no weight as proof and does not carry any presumption of guilt. You must not be influenced by it in any way in considering this case.

The defendant having taken the witness stand to testify in his own behalf is governed by the same rules in testing his credibility and the correctness of his statements as every other witness. You have the right to believe or disbelieve him just as he impresses you as to the truth or falsity of his testimony.

In Louisiana criminal intent may be specific or general. Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired prescribed criminal consequences to follow his act or failure to act. General criminal intent is present whenever there is specific intent. And, also, when the circumstances indicate that the offender in the ordinary course of human experience must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. In other words, ladies and gentlemen, intent is a state of mind, and it cannot be seen or photographed. Though intent is a question of fact, it need not be proved as a fact. It may be inferred from the nature and facts of the case. It may be inferred from the circumstances of the transaction. It may be inferred from all of the circumstances established during the trial. Intent involves premediation. Criminal intent exists when the act from which a crime results is done willfully. In criminal laws, premeditation means a design or preconceived plan to commit a crime. It denotes the will and deliberate and continued persistence to commit a crime. It is immaterial whether the intent or premeditation existed for a brief or great length of time before the commission of the crime. It is sufficient if the intent existed only a moment before the crime was committed.

As to murder, the law requires definite time frames

within which the specific intent to kill or inflict great bodily harm must have been formed. The specific intent may have existed a moment before the act which caused death. Or, it may have been formed a day before or any time before the act which caused death.

You, ladies and gentlemen, are the exclusive judges of the facts. You are to find from the evidence which facts have been proved and which facts have not been proved. And for this purpose you determine the credibility of the witnesses accordingly as you are impressed with their veracity. You may take into account their manner, their demeanor, their manner on the stand, the probability or improbability of their statements, the interest or lack of interest they may have in the case and every circumstance surrounding the giving of their testimony which may aid you in weighing their statements. If you believe that any witness in this case, either for the State or for the Defense, has woefully and deliberately testified falsely to any material fact, then I charge you that you are justified in disregarding the entire testimony of such witness as proving nothing and as unworthy of belief. You have the right to accept as true or to reject as false the testimony of any witness accordingly as you are impressed with their veracity. Under our law you are not bound to decide any issue or fact by the number of witnesses presented by either the State or the Defense. The question and the test is not which side has the greatest number of witnesses or uses the greatest quantity of evidence, but which witness and which evidence appear to your mind to be more accurate and otherwise trustworthy.

No, you, the jury, alone shall determine the weight and

the credibility of the evidence. Evidence includes sworn testimony of witnesses, exhibits admitted into the record and facts which may have been stipulated to by the attorneys for the State and for the Defense. You cannot consider as evidence any statements made by lawyers during the trial. However, if the attorneys have stipulated to any fact, you will regard that fact as being conclusively proven. You cannot go beyond the evidence just referred to convict the defendant of the crime charged.

Now, you, ladies and gentlemen, are the judges of the law but in a different sense. You receive the evidence from the witnesses, and you receive the law from this Court. It is your duty to accept the law and to apply it as it is given to you by this Court.

On questions involving the knowledge obtained only by means of a special training or experience, the opinions of persons having such special knowledge are admissible as expert testimony. Every expert witness must state the facts upon which their opinions are based. The test of the competency of an expert in his knowledge or the subject about which he is called upon to express an opinion, and before any witness can give evidence as an expert, their competency so to testify must have been established to the satisfaction of the Court. Where experts differ, the best supporting inferences should be adopted. And finally, insofar as expert testimoney is concerned, you are to take it and consider it as you do all the other evidence. Examine it as I have instructed you on the testimony of any other witness on the witness stand.

In Louisiana the law defines principals as follows:

"All persons concerned in the commission of a

crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime are guilty as principals." However, under R/S 14:24, not all principals are automatically guilty of the same grade of the offense. One who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of the crime depending on the mental element proved at trial. Thus, an individual may only be convicted as a principal for those crimes for which he personally has the requisite mental state. Proof of one person's intent is not proof of another's intent. In the case of a first degree murder trial, the requisite mental state is that the defendant had the specific intent to kill. It is not enough to find merely that his co-conspirator or accomplice had the necessary mental state, since this intent cannot be inferred to the accused. It must be shown that this accusesd also had the specific intent to kill.

The defendant in this case is charged ,,, One more before we go on.

Motive. Motive is the condition of mind which causes one to act. Motive may be established by external facts. The prosecution may stop with proof that the crime was committed and need not prove motive.

The defendant in this case is charged with first degree murder. There are four verdicts responsive to this charge. They are guilty as charged, guilty of second degree murder, guilty of manslaughter and not guilty.

First degree murder is the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm, and the offender is engaged

in the perpetration of an armed robbery or attempted perpetration of an armed robbery at the time of the killing. Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another by use of force or intimidation which armed with a dangerous weapon. A dangerous weapon is any instrumentality which in the manner used is likely to cause death or great bodily harm. An attempted crime takes place when an offender with a specific intent to commit a certain crime does or omits some action designed to accomplish that end. So, if you find that, 1. That the defendant killed or was a principal to a killing, and 2. That the defendant had the specific intent to kill or to inflict great bodily harm upon the victim, and 3. That the defendant was engaged in the perpetration or attempted perpetration of an armed robbery at the time, and that this took place in Orleans Parish on or about the date specified in the Bill of Indictment, then you shall find the defendant guilty as charged of murder in the first degree.

The second verdict responsive to this charge is that of second degree murder. There are two forms of this: Specific intent murder and felony murder. Each will be explained to you in turn. Second degree murder takes place when there is a killing, and the offender had the specific intent to kill or inflict great bodily harm. So, if you find that the defendant killed, was a principal to a killing and he intended to kill or to inflict great bodily harm upon the victim, and that this took place in this parish on or about the date specified in the Bill of Indictment, then you shall find the defendant guilty of second degree murder. Second degree murder also takes place when an offender engages in the commission of an armed robbery in which a killing occurs. It is not necessary

that there be any specific intent to kill or to inflict great bodily harm upon the victim. The essence of the crime lies in the offender's willing participation in a situation the result of which was a death. You have already been informed of the law concerning the crimes of armed robbery and attempted armed robbery. So, if you find that 1. The defendant committed an armed robbery or attempted armed robbery during the course of which a killing occurred, and that this took place in the Parish of Orleans on or about the date specified in the Bill of Indictment, then you shall find the defendant guilty also of second degree murder.

Manslaughter. Manslaughter is the killing of a human being when the offender has the specific intent to kill but the killing is committed in sudden passion or heat of blood caused by some immediate provocation sufficient to deprive an average person of his self control and cool reflection. This provocation shall not reduce a homicide to manslaughter if the defendant's blood actually cooled or if the average person's blood would have cooled in the time between the provocation and the offense. So, if you find that, 1. That the defendant killed or was a principal to a killing. 2. That the defendant had the specific intent to kill or to inflict great bodily harm, and 3. That this intention of the defendant was caused by some provocation which caused the defendant to lose his self control and cool reflection, and 4. That this provocation would have had the same effect on any reasonable man or woman. And 5. That in between this provocation and the killing the defendant did not regain his self control, and furthermore, a reasonable man would have not regained their self control, and 6. Of course, if this took place in this parish on or about the date specified in the Bill of Indictment.

And the fourth response to this charge is that of not guilty.

Now, you, ladies and gentlemen, took an oath at the outset of this trial to render a verdict according to the law and the evidence. Both the State and the Defense are entitled to that kind of verdict. Your sworn obligation requires each of you to give the matter before you the best thought at your command and to form your conclusions only upon the law and the evidence presented to the exclusion of any other fact or circumstance. Each of you, therefore, in order to arrive at your own verdict must carefully and conscientiously weigh and appraise the evidence and apply the law according to your own best judgment and understanding. While it is the duty of each of you to do your own thinking, that you reach your own verdict, the attainment of that purpose does not involve or contemplate remaining aloof from your fellow jurors. If that rugged individualism had been intended, the law would have provided for the isolation of jurors and for their solitary and seclusive meditation. Instead, the law provides that you sit and deliberate together, and hence, while no juror should surrender their judgments or their consciences, neither should any of you all be obstinately closing your minds to the persuasions of your fellow members. Rather, it is the purpose and intent of the law and the evidence before you that you discuss them fully and freely, carefully and conscientiously, thoroughly and temperately, all to the end that you may reach a verdict that will serve the ends of justice.

Now, both the State and the Defense are entitled to the individual appreciation of the evidence and the law of this case from each and everyone of you. You have the right to discuss the evidence and the law among yourselves, and you have the right to at-

tempt to change the opinion of a fellow juror provided you attempt to change their opinion based on the law and the evidence. You have the right to change your own opinion, provided it has to do with the law and the evidence. But once you all have arrived at a conclusion based on the law and the evidence both the State and the Defense are entitled to that conclusion and entitled to have you remain with that conclusion.

Now, jurors must rely on their memory in reaching a verdict. You all shall not be permitted to refer to notes or have access to any written evidence. The testimony shall not be repeated to the jury. However, upon a request of a juror and in the discretion of this Court I may allow you to take with you or have sent to you any object or document received in evidence when a physical exam is required to enable you to arrive at a verdict.

When you retire to the jury room you should select one of your number as your foreman. It will require 12 unanimous of you all to agree upon any verdict. The foreman will write upon the back of the list of responsive verdicts, which you will bring with you to the jury room, the date, the City of New Orleans, and "We, the jury, find the defendant, ..." And whatever your verdict is. And the foreman shall sign his or her name thereunder, and write the name, "Foreman" or "Foreperson," whatever you're more comfortable with, under your name. Again 12 of you must agree to return a legal verdict. If, after retiring, you desire to be instructed on any matter of law, you are free to return to the Court, and the Court will reread any part of the charges you request or furnish you with any other legal proposition that may be pertinent.

Now, ladies and gentlemen, I'm sending up a document with you all. It's for the ... One side is for the benefit

of everyone. The back side is for the benefit of the foreman. The front side lists the responsive verdicts. There are only four. They are guilty as charged, guilty of second degree murder, manslaughter and not guilty. The reverse side is for the foreman. We've typed everything for the foreman. We've typed in the city, the date, and we've even put in the first part, "We, the jury, find the defendant, Gerald B. Baker, to be ..." And then a blank. And the foreman will pick 1 through 4, one of the responsive verdicts, and write it out. Not 1, 2, 3, 4. Write it out. "Guilty as charged, guilty of second degree murder, guilty of manslaughter, or not guilty," in that blank. And then the foreman will sign his or her name, and if it's a she, and she doesn't like foreman, she can change it. Okay?

Now, let me explain to you before I send you upstairs what this situation will be. First of all, you will go upstairs and you will deliberate until you reach a verdict. If you reach a responsive verdict of second degree murder or of manslaughter, or not guilty, you will come down; you will return the verdict to the Court, and you will be sent home. If you return a verdict of guilty as charged, that is, of manslaugher, you will go back upstairs. There will be a short preparation. You will come back down, and we will have a mini trial. Because if you come back guilty as charged, you, the jury, must decide whether or not the defendant will receive the death penalty or not. And there will be some law given to you, and there will be some mitigating circumstances; and there will be aggravating circumstances. But we won't cover that until we find out what your verdict is going to be. Okay? Before I send you upstairs for your deliberations, I would like to thank Mary Hollier. Thank you so much, Ms. Hollier. You're excused. Do you have to go upstairs to get your things? I'd like you to do it now because I'm going to wait before I send the jury upstairs.

Ms. Hollier, if you just wait around after we'll find some way to get you home. Okay?

BY THE ALTERNATE JUROR:

I have a ride.

BY THE COURT:

Oh, okay. All right. Well, one of these fine men will take you to your car. Okay? All right, where's the sheriff? Take this up with you, please, when you take them up. Lunch, whatever you want to call it, supper is here, and we'll send it upstairs.

REPORTER'S NOTE:

Prior to the jurors exiting the courtroom to deliberate, the court reporter approached the bench.

BY THE COURT:

No. I must have ... My clerk ... I mean, my court reporter pointed it out. If you reach a verdict of guilty as charged you will come back down and we will have a brief trial. You understand that? If you return a verdict of second degree murder, manslaughter or not guilty, we will come back down, and you will submit your verdict to the court, and the trial will be over. But if you come back with a verdict of guilty as charged, you will go back upstairs and we'll have a brief, very brief, trial after that. Okay? All right. Ladies and gentlemen, will you go upstairs to begin your deliberations.

REPORTER'S NOTE:

The jurors exited the courtroom for deliberations.

BY MR. FLEMING:

I would object to the Court's charge in the definition on the last part where it says when you're talking about he's charged with first degree murder, and you find that ... Then you're giving 1, 2, 3, and 4. I believe that the work "and" should be included between each one of those.

BY THE COURT:

All right, let it be lodged.

BY MR. FLEMING:

Additionally, in your last statement to the jury, where you said that, "You will go upstairs until you reach a verdict." And I believe that was confusing in that the jury may think they may be locked in that room forever without the benefit if they can't reach a verdict tonight they would have the opportunity to retire.

BY THE COURT:

Well, I'll tell them that when I bring them down shortly to find out how they're doing. I'll tell them. Remind me to tell them that when they come down. Because I don't let them stay up there forever. I bring them down to find out how they're progressing.

BY MR. FLEMING:

But you did say, "You will go up there until you reach a verdict," and I ...

BY THE COURT:

Im sorry?

BY MR FLEMING:

You did state that ...

BY THE COURT:

Well, when I bring them down I'll give them your admonishment, counselor.

BY MR. FLEMING:

Thank you, Judge.

BY THE COURT:

All right. I don't want the lawyers going far. I'm not saying you can't leave. I'm saying if you leave, leave a number, and don't be more than 15 or 20 minutes away. Okay?

BY MR. WILLIAMS:

Yes, sir.

BY MR. HARTLEY:

Yes, sir.

BY THE COURT:

All right.

* * * * *

REPORTER'S NOTE:

Upon the request of the jurors they returned to the courtroom for further instructions.

BY THE COURT:

I understand we need some instructions. Is that correct?

BY THE FOREMAN OF THE JURY:

Yes, sir.

BY THE COURT:

Who's the foreman?

BY THE FOREMAN:

I am.

BY THE COURT:

Yes, sir?

BY THE FOREMAN:

Yes, sir, we need to have you reread for us the four potential verdicts.

BY THE COURT:

Fine. Okay. All right, ladies and gentlemen, the defendant in this case is charged with first degree murder. There are four verdicts responsive to this charge — guilty as charged, which is guilty of first degree murder; guilty of second degree murder, guilty of manslaughter, and not guilty.

First degree murder is the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm, and the offender is charged in the perpetration of attempted or ... Excuse me. Of

attempted armed robbery or an armed robbery at the time of the killing.

Armed robbery is the taking of anything of value belonging to another from the person of another or that is in the immediate control of another by use of force or intimidation, while armed with a dangerous weapon. A dangerous weapon is any instrumentatily, which in the manner used, is likely to cause death or great bodily harm. An attempted crime takes place when an offender with the specific intent to commit a certain crime does or omits some action designed to accomplish that end. So, if you find that, 1. The defendant killed or was a principal to a killing of the victim. 2. That the defendant had the specific intent to kill or to inflict great bodily harm upon the victim. 3. That the defendant was engaged in the perpetration or attempted perpetration of an armed robbery at the time, and 4. That this took place in Orleans Parish on or about the date specified in the Bill of Indictment, then you shall find the defendant guilty of first degree murder.

The second verdict responsive to this charge is that of second degree murder. There are two forms of this — specific intent murder and felony murder. Each will be explained to you in turn. Second degree murder takes place when there is a killing, and the offender had the specific intent to kill or inflict great bodily harm. So, if you find that the defendant killed, or was a principal to a killing, and he intended to kill or to inflict great bodily harm upon the victim, and that this took place in this parish on or about the date specified in the Bill of Indictment, then you will find the defendant guilty of second degree murder.

The other second degree murder that I was speaking of is called second degree felony murder. And it takes

place when an offender engages in the commission of an armed or attempted armed robbery in which a killing occurs. It is not necessary that there be any specific intent to kill or to inflict great bodily harm upon the victim. The essence of the crime lies in the offender's willing participation in a situation, the result of which was a death. You have already been informed of the law concerning of attempted and armed robbery, attempted armed and armed robbery. So, if you find that the defendant committed an armed robbery or attempted armed robbery during the course of which a killing occurred, and that this took place in this parish on or about the date specified in the Bill of Indictment, then you shall find the defendant guilty of second degree murder.

Manslaughter. Manslaughter is the third responsive verdict to this charge. It is the killing of a human being when the offender has the specific intent to kill, but the killing is committed in sudden passion or heat of blood caused by some immediate provocation sufficient to deprive an average person of his self control and cool reflection. This provocation shall not reduce a homicide to manslaughter if the defendant's blood actually cooled or if the average person's blood would have cooled in the time between the provocation and the offense. So, if you find that 1. The defendant killed or was a principal in the killing; 2. That the defendant had the specific intent to kill or to inflict great bodily harm. 3. That this intention of the defendant was caused by some provocation which actually caused the defendant to lose his self control and cool reflection; And 4. That this provocation would have had the same effect on any reasonable man. And, 5. That in between the provocation and the killing the defendant did not regain his self control; and furthermore, a reasonable man or woman would have not regained their self control. And, of course, 6. That this took

place in this parish on the date specified in the Bill of Indictment. Then you shall find the defendent guilty of manslaughter.

The fourth responsive verdict to this charge is that of not guilty.

Now, ladies and gentlemen, when I first instructed you all I failed ... I would imagine you all know by now in the latter part of the month that you will sit and hopefully derive a verdict. If it's impossible, if it's absolutely impossible, and if I am convinced it is impossible, then I, of course, could declare a mistrial, a hung jury, and send you home. Of course, I have to be convinced. We've been at this thing for many days, and I will have to be convinced that you all are at a dead end brick wall. And if you find yourselves at that position, let me know. That's not to say we're going home. I want to hear. I want to instruct more. I want to make positively sure that that's the situation. I don't think that's the situation now, but I failed to tell you that when you went upstairs, assuming you knew. But some of the lawyers told me that I should remind you. And in case you all didn't know ... I'm sure you did, but in case you didn't know, that is the law. Again, if ... To remind you of the situation you will go upstairs and deliberate to reach a verdict. If you reach second degree murder, manslaughter or not guilty the trial is over. You will go home. If you find the defendant guilty of first degree murder, then we will come down and have a second trial, a mini trial, so to speak, where you will determine the sentence. And, of course, if you all are unable to reach a verdict, and I am convinced that that you are unable to reach a verdict, then I could declare a mistrial. So those are the possibilities.

Does anybody want to hear anything else more while we're down.

REPORTER'S NOTE:

There was no response from the jurors.

BY THE COURT:

Okay. Knock if you need me. Sheriff, take them up up to continue their deliberations.

REPORTER'S NOTE:

The jurors exited the courtroom to continue deliberating.

BY MR. FLEMING:

If I could I would like to reurge my objection to Your Honor's charge on first degree murder in the ...

BY THE COURT:

You mean the "and/or."

BY MR. FLEMING:

I believe there should be ...

BY THE COURT:

I don't think you have to renew that. You said it already.

BY MR. FLEMING:

I believe there should be an "and," since you gave the charge again.

BY THE COURT:

All right.

BY MR. FLEMING:

And, also, I have a question to ask of the Court, maybe Mr. Hirstius. I don't know that when we showed the jury the evidence before, was the jury allowed to look at the evidence from the Tulane Medical Center. Were they ever showed the Tulane Medical Center records of Mrs. Alden when they were in the box?

BY THE COURT:

I don't think I let them see that.

BY MR. FLEMING:

I know that after we rested you allowed them to see some evidence.

BY THE COURT:

I know. But I did not allow them to see that. We had the testimony from the man from the hospital, did we not?

BY MR. FLEMING:

I wasn't sure what evidence they were allowed to look at.

BY THE COURT:

I did not allow them to look at that. Now, if you have a problem with that you better put it on the record, because I think I was correct. I think the best evidence came from the doctor that testified.

BY MR. FLEMING:

I agree. I'm not making objection. I'm just trying to determine what evidence they ...

BY THE COURT:

No, we would have still been down here if they had been looking at those records.
The court will stand in recess.

* * * * *

BY THE COURT:

Before they come down, I don't know what the verdict is. I think it's been a trying three days. I know that the defendant has quite a bit of family here, and I know the victims' families are here. And no matter what the verdict is, I would like some decorum in the courtroom. The lawyers, regardless of the verdict, both sides have done an admirable job advocating their different positions. And I would like to keep ... This has been a perfect week as far as decorum goes, and I'd like to keep it.

REPORTER'S NOTE:

The jurors returned to the courtroom.

BY THE COURT:

Let the record reflect that the jury is present and accounted for. Ladies and gentlemen, have you all reached a verdict?

BY THE FOREMAN OF THE JURY:

Yes, we have.

BY THE COURT:

Would you hand the verdict to my clerk, please.

BY MR. HIRSTIUS:

"New Orleans, Louisiana, August 24, 1989. We, the jury, find the defendant, Gerald B. Baker, to be guilty as charged, Bruce Blaum, foreman."

BY THE COURT:

Ladies and gentlemen, you all have reached a capital